

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

JANUARY TERM, 1929

No. 4907.

646

HOWARD MORAN, APPELLANT,

Robert H. Lucas, vs.

1 COMMISSIONER OF INTERNAL REVENUE.

AND

No. 4908.

JAMES F. SHEA, APPELLANT,

Robert H. Lucas, vs.

1 COMMISSIONER OF INTERNAL REVENUE.

APPEALS FROM THE BOARD OF TAX APPEALS.

FILED JANUARY 12, 1929.

PRINTED FEBRUARY 12, 1929.

Court of Appeals of the District of Columbia

JANUARY TERM, 1929.

No. 4907.

HOWARD MORAN, APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE.

AND

No. 4908.

JAMES F. SHEA, APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 4907.

HOWARD MORAN, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

and No. 4908.

JAMES F. SHEA, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE.

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Docket 10101.

HOWARD MORAN, 2700 Connecticut Ave., Washington, D. C.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

For the taxpayer: Geo. P. Hoover, Esq. Lawrence
Graves, Esq.

For the Comm'r: M. N. Fisher, Esq. W. F. Gibbs, Esq.

Docket Entries.

1925.

Dec. 19. Petition received & filed.

“ 22. Copy of petition served on Solicitor.

“ 22. Notification of receipt mailed taxpayer.

1926.

Feb. 1. Answer & motion to place on Reserve Calendar
filed by Solicitor.

“ 8. Granted to Reserve “B.” Both sides notified.

1927.

- Feb. 28. Motion to set for trial during the week of 5-23-27 filed by taxpayer.
- Mar. 3. Granted to June 6/27. Both sides notified.
- May 18. Motion to amend answer embodying amendment filed by G. C.
- “ 21. Granted. Both sides notified.
- “ 26. Motion for continuance to 6-7 or 6-8-27 filed by taxpayer.
- “ 26. Granted to June 8-27. Both sides notified.
- June 6. Application for subpoena filed by G. C.
- “ 8. Hearing had before Mr. Green on the merits. 60 days to file briefs.
- “ 13. Transcript of hearing 6-8-27 filed.
- July 18. Memorandum brief filed by G. C.
- “ 27. Motion for extension of 30 days in which to file brief filed by taxpayer.
- “ 27. Granted. Both sides notified.
- Sept. 6. Brief filed by taxpayer.

1928.

- April 13. Findings of fact & opinion rendered (Mr. Littleton). Judgment will be entered on 15 days' notice.
- May 28. Motion for correction of findings of fact filed by taxpayer.
- June 11. Order amending Board's findings of fact, paragraphs 2 & 3, entered.
- “ 22. Notice of settlement filed by G. C.
- “ 25. Hearing set July 25th on settlement.
- July 25. Hearing had before Mr. Sternhagen on settlement Rule 50. Assigned to Mr. Littleton for order.
- “ 27. Order of redetermination entered.
- Nov. 13. Supersedeas bond for \$460.00 approved & ordered filed.
- “ 13. Petition for review by Court of Appeals of D. C. with assignments of error filed by taxpayer.
- “ 13. Proof of service filed.
- “ 13. Præcipe of record with proof of service endorsed thereon filed by taxpayer.
- Dec. 28. Statement of evidence lodged by taxpayer. Approved & ordered filed 1-7-29.

Now, January 9, 1929, the foregoing Docket Entries, #10101, certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

2 Docket 10654.

JAMES F. SHEA, 643 Louisiana Ave., Washington, D. C.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

For the taxpayer: George P. Hoover, Esq. Lawrence Graves, Esq.

For the Comm'r: M. N. Fisher, Esq. W. F. Gibbs, Esq.

Docket Entries.

1926.

Jan. 5. Petition received & filed.

" 12. Copy of petition served on Solicitor.

" 12. Notification of receipt mailed taxpayer.

Feb. 20. Answer filed by Solicitor.

Mar. 22. Copy of answer served on taxpayer. Assigned to General Calendar.

1927.

Mar. 15. Hearing date set 5-2-27.

May 2. Hearing had before Mr. Milliken. Continued by agreement.

" 2. Ordered proceeding be continued to 6-6-27 to be heard with 10101 signed & filed. Both sides notified.

" 18. Motion to amend answer embodying amendment filed by G. C.

" 21. Granted. Both sides notified.

" 26. Motion for continuance to 6-7 or 6-8-27 filed by taxpayer. Granted to 6-8-27.

June 6. Application for subpoena filed by G. C.

" 8. Hearing had before Mr. Green on merits. Briefs due in 60 days. Submitted.

" 13. Transcript of hearing 6-8-27 filed.

July 18. Memo. brief filed by G. C.

Sept. 6. Brief filed by taxpayer.

1928.

April 13. Findings of fact & opinion rendered (Mr. Littleton). Judgment will be entered on 15 days' notice under Rule 50.

May 28. Motion for correction of findings of fact filed by taxpayer.

June 11. Order amending Board's findings of fact, (2d & 3d paragraphs) entered.

" 22. Notice of settlement filed by G. C.

" 25. Hearing set on settlement 7-25-28. See 10101.

July 25. Hearing had before Mr. Sternhagen on settlement. Assigned to Mr. Littleton for order.

" 27. Order of redetermination entered.

Nov. 13. Supersedeas bond for \$3,878.00 approved & ordered filed.

" 13. Petition for review by Court of Appeals of D. C. with assignments of error filed by taxpayer.

" 13. Proof of service of petition filed.

" 13. Præcipe of record with proof of service endorsed thereon filed by taxpayer.

Dec. 28. Statement of evidence lodged by taxpayer. See 10101. Approved & Ordered filed. 1-7-29.

Now, January 9, 1929, the foregoing Docket Entries, #10654, certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

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Filed Dec. 19, 1925.

United States Board of Tax Appeals.

Docket No. 10101.

Howard Moran, 2700 Connecticut Avenue, Washington, D. C.

Petition.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set

forth in his deficiency letter (IT:PA-3-VPK-305) dated October 24, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is an individual residing at 2700 Connecticut Avenue, Washington, D. C.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on October 24, 1925.

3. The taxes in controversy are income taxes for the calendar year 1919 and are less than \$10,000, to wit \$323.78.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(1) The determination by the Commissioner that the taxpayer realized a profit of \$3,000 in the year 1919 from the sale of 10 shares of the capital stock of the Home Savings Bank of Washington, D. C.

4 5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer was the owner of ten (10) shares of the capital stock of the Home Savings Bank, five (5) shares of which were acquired prior to March 1, 1913, having a fair market value on such date of \$325 per share which was higher than cost. The remaining five (5) shares were acquired in 1919 at a cost of \$460 per share.

(b) On March 18, 1919, the taxpayer, as one of the stockholders of the Home Savings Bank, entered into an agreement pursuant to which he was to sell his stock in such Bank to the American Security and Trust Company for \$400 per share. Under this agreement the taxpayer was permitted to purchase four shares of the stock of the American Security and Trust Company for \$100 per share for each share of the Home Savings Bank stock which he had previously owned.

(c) The agreement was carried out and the taxpayer received \$4,000 for the Bank stock. This \$4,000 was then used to acquire forty (40) shares of the American Security and Trust Company stock.

(d) In the determination of the deficiency the Commissioner has treated the transaction as an exchange of stock for stock under the provisions of Article 1569 of Regulations 45 and has determined that the taxable profit is \$3,000.

5 The taxpayer, in support of its appeal, relies upon the following propositions of law:

(a) The transaction was not an exchange of stock for stock within the meaning of Section 202(b) of the Revenue Act of 1918.

(b) Under the provisions of Sections 735 and 743 of the Law Code of the District of Columbia the transaction could not be an exchange of stock for stock.

(Sgd.) LAWRENCE GRAVES,
 Counsel for Taxpayer,
 618 Southern Building, Washington, D. C.

CITY OF WASHINGTON,
 District of Columbia, ss:

Howard Moran, being duly sworn, says that he is the taxpayer above named, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(Sgd.) HOWARD MORAN.

Subscribed and sworn to before me this 18 day of Dec. 1925.

ROSS E. POLLOCK, [SEAL.]
 Notary Public.

6 Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:PA-3.
VPK-305.

October 24, 1925.

Mr. Howard Moran,
 2700 Connecticut Avenue,
 Washington, D. C.

SIR:

The determination of a deficiency of \$323.78 in your income tax liability for the taxable year 1919, as set forth in

office letter dated February 26, 1925 is disclosed to be correct.

In accordance with the provisions of section 279(b) of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-3:VPK-305. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner,

By C. R. NASH,
Assistant to the Commissioner.

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Statement.

IT:PA-3.
VPK-305.

October 24, 1925.

In re Mr. Howard Moran, 2700 Connecticut Avenue, Washington, D. C.

A deficiency in tax of \$323.78 for the year 1919 was assessed as the result of a Revenue Agent's report dated February 16, 1925. A claim for the abatement of this tax was subsequently filed, based on an appeal pending before the United States Board of Tax Appeals.

By office letter of September 11, 1925 opportunity was granted to present a protest against the adjustment indicated.

In reply to office letter referred to a protest was submitted requesting that this matter be held in abeyance until a decision has been rendered by the United States Board of Tax Appeals in the case of B. F. Saul, Washington, D. C.

With reference to your request, you are advised that it will be impracticable to withhold action on your case pending a decision by the United States Board of Tax Appeals.

The claim is therefore rejected.

Now, January 9, 1929, the foregoing Petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

8 Filed Feb. 1, 1926, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10101.

Appeal of Howard Moran, Washington, D. C.

Answer.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of October 24, 1925.

(3) Admits that the taxpayer was the owner of ten shares of the capital stock of the Home Savings Bank, five of which were acquired prior to March 1, 1913 and five of which were acquired in 1919 at a cost of \$460 per share; but denies that the fair market value of the stock of the Home Savings Bank was \$325 per share on March 1, 1913.

(4) Denies the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits the allegations contained in subparagraph (d) of paragraph 5.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

Proposition of Law.

When, in a reorganization, merger or consolidation, the aggregate par or face value of the new stock received is in excess of the aggregate par or face value of the stock exchanged, the amount of the excess in par or face value is gain to the extent that the fair market value of the new stock is greater than the cost or March 1, 1913 value, whichever is greater, of the stock exchanged.

9 Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney, Bureau of Internal Revenue.

Now, January 9, 1929, the foregoing Answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

10 United States Board of Tax Appeals.

Docket No. 10101.

HOWARD MORAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Answer.

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for amended answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits the allegations contained in paragraph 3 of the petition; except that he denies that the amount in controversy is therein correctly stated.

(4) Denies that he erred in the respects alleged in paragraph 4 of the petition; but avers that he erred in that he determined that the transaction in question was an exchange of stock for stock and computed the profit from such transaction accordingly whereas he should have determined that the transaction was a sale of his shares of stock in the Home Savings Bank for \$400.00 per share in cash plus the right to subscribe to four shares of stock of the American Security and Trust Company at \$100.00 per share, the value of such right being \$120.00 per share of the Trust Company stock, or a total of \$480.00, for each share of bank stock sold, thus he sold each share of bank stock for a total consideration of \$880.00.

11 (5) (a) Admits the allegations contained in subparagraph (a) of paragraph 5.

(b) Admits the allegations contained in subparagraph (b) of paragraph 5; and avers that the value of the right to purchase the shares of stock of the American Security and Trust Company for \$100.00 per share was \$120.00 per share.

(c) Admits that the agreement was carried out; and that the taxpayer received \$11,600.00 in cash; but avers that he also received \$4,800.00 in the form of a right to purchase 40 shares of Trust Company stock at \$100.00.

(d) Admits the allegations contained in subparagraph (d) of paragraph 5; but now avers that the computation of the profit was erroneous as hereinbefore alleged.

(6) Avers that heretofore; to wit, on July 31, 1926, the Board of Tax Appeals rendered its decision in the appeals of B. F. Saul, et als., Docket Nos. 3244, 3245, 3652, 3736, 4224, 4826 and 4907; that the transaction in question in the instant appeal is precisely the same transaction that was before the Board in the aforementioned appeals, this taxpayer being one of the stockholders of the Home Savings Bank and B. F. Saul and the others aforementioned also being stockholders of the Home Savings Bank; that in the aforementioned appeals the Board held that the transaction in question was not an exchange of stock for stock under the

provisions of Section 202 of the Revenue Act of 1918 but that it was a sale of stock of the Home Savings Bank under the provisions of the aforesaid Section and that the sellers received for each share of Home Savings Bank stock \$400.00 in cash and the right to subscribe to four shares of the stock of the American Security and Trust Company, the value of the right of each share being \$120.00, or a total of \$480.00,

12 thus resulting in a sale of the stock of the Home Savings Bank for the total sum of \$880.00 per share; and by reference alleges as true each and every fact found by the Board in its decision in the appeals of B. F. Saul, et als., as completely and fully as if set out verbatim herein insofar as the facts therein found are pertinent to the instant appeal, that is, excluding only those findings of fact relating solely to B. F. Saul, and the other stockholders therein mentioned.

Wherefore, it is prayed that the Board find that the taxpayer sold each share of its stock in the Home Savings Bank for \$400.00 cash and the right to subscribe to four shares of stock of the American Security and Trust Company, the value of such right being \$480.00 and that it order the recomputation of the deficiency under Rule 50 in accordance with such findings.

A. W. GREGG,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

M. N. FISHER,

Special Attorney.

Now, January 9, 1929, the foregoing Amended Answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Filed Jan. 25, 1926.

United States Board of Tax Appeals.

Docket No. 10654.

Appeal of Mr. JAMES F. SHEA, 643 Louisiana Avenue, Washington, D. C.

Petition.

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:3-60D-VPK-305, dated November 6, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with office at 643 Louisiana Avenue, Northwest, Washington, D. C.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on November 6, 1925.

3. The taxes in controversy are income taxes for the calendar year 1919 and are less than \$10,000; to wit, \$1,446.76.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(1) The determination by the Commissioner that the taxpayer realized a profit of \$8,700.00 in the year 1919 from the sale of 29 shares of the capital stock of the Home Savings Bank of Washington, D. C.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer was the owner of twenty-nine (29) shares of the capital stock of the Home Savings Bank which were acquired prior to March 1, 1913, having a fair market value on such date of \$325 per share which was higher than cost.

(b) On March 18, 1919, the taxpayer, as one of the stockholders of the Home Savings Bank, entered into an agreement pursuant to which he was to sell his stock in such Bank to the American Security and Trust Company for \$400 per share. Under this agreement the taxpayer was

permitted to purchase four shares of the stock of the American Security and Trust Company for \$100 per share for each share of the Home Savings Bank stock which he had previously owned.

(c) The agreement was carried out and the taxpayer received \$11,600 for the Bank stock. This \$11,600 was then used to acquire one hundred and sixteen (116) shares of the American Security and Trust Company stock.

(d) In the determination of the deficiency the Commissioner has treated the transaction as an exchange of stock for stock under the provisions of Article 1569 of Regulations 45 and has determined that the taxable profit is \$8,700.00.

15 The taxpayer, in support of his appeal, relies upon the following propositions of law:

(a) The transaction was not an exchange of stock for stock within the meaning of Section 202 (b) of the Revenue Act of 1918.

(b) Under the provisions of Sections 735 and 743 of the Law Code of the District of Columbia the transaction could not be an exchange of stock for stock.

(Sgd.)

LAURENCE GRAVES,

Counsel for Taxpayer,

618 Southern Bldg., Washington, D. C.

CITY OF WASHINGTON,

District of Columbia, ss:

James F. Shea, being duly sworn, says that he is the taxpayer above named, and as such is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

(Sgd.)

JAMES F. SHEA.

Subscribed and sworn to before me this 4th day of January, 1926.

[SEAL.]

ROBERT R. FAULKNER,

Notary Public.

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

IT:PA:3-60D.
VPK-305.

Nov. 6, 1925.

Mr. James F. Shea,
643 Louisiana Avenue,
Washington, D. C.

SIR:

Reference is made to your claim for abatement of a deficiency in tax amounting to \$1,446.76, assessed against you for the taxable year 1919.

In accordance with the provisions of Section 279(b) of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:3-60D-VPK-305. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR

Commissioner,

By C. R. NASH,

*Assistant to the Commissioner.**Statement.*IT:PA:3-60D.
VPK-305.

Nov. 6, 1925.

In re Mr. JAMES F. SHEA, 643 Louisiana Avenue, Wash-
ington, D. C.

Year.	Tax assessed.
1919	\$1,446.76

The report of the Supervising Internal Revenue Agent at Baltimore, Maryland, dated February 18, 1925, has been reviewed by this office and approved as submitted.

The claim constitutes a protest on the assessment of a deficiency in tax resulting from the audit of your return, in connection with a Revenue Agent's report, in which additional profit was included on the exchange of the Home Savings Bank stock.

You are advised that it will be impracticable for this office to withhold action on your return until a decision is reached on the return of Mr. B. F. Saul, now pending before the Board of Tax Appeals.

Since no evidence has been submitted indicating that the action previously taken on your return is incorrect, your claim will therefore be rejected.

Payment should not be made until a bill is received from the Collector of Internal Revenue and remittance should then be made to him.

Now, January 9, 1929, the foregoing Petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

18 Filed Feb. 20, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10654.

Appeal of JAMES F. SHEA, Washington, D. C.

Answer.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of November 6, 1925.

(3) Admits that the taxpayer was the owner of 29 shares of the capital stock of the Home Savings Bank which were acquired prior to March 1, 1913; but denies that the fair market value of the shares was \$325 each on the aforementioned date.

(4) Admits that on March 18, 1919, the taxpayer, as one of the stockholders of the Home Savings Bank, entered into a certain agreement; but denies that the agreement was as alleged in subparagraph (b) of paragraph 5.

(5) Admits that the agreement which the taxpayer entered into was duly carried out; but denies that the taxpayer received \$11,600 for the bank stock; and denies that this \$11,600 was then used to acquire 116 shares of the stock of the American Security and Trust Company.

(6) Admits the allegation contained in subparagraph (d) of paragraph 5.

(7) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

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Propositions of Law.

(1) The transaction in question was an exchange of stock for stock within the meaning of Section 202(b) of the Revenue Act of 1918.

(2) When, in a reorganization, merger or consolidation, the aggregate par or face value of the new stock received is in excess of the aggregate par or face value of the stock exchanged, the amount of the excess in par or face value is gain to the extent that the fair market value of the new stock is greater than the cost or March 1, 1913, value, whichever is greater, of the stock exchanged.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, January 9, 1929, the foregoing Answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

20 United States Board of Tax Appeals.

Docket No. 10654.

JAMES F. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Amended Answer.

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for amended answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits the allegations contained in paragraph 3 of the petition; except that he denies that the amount in controversy is therein correctly stated.

(4) Denies that he erred in the respects alleged in paragraph 4 of the petition; but avers that he erred in that he determined that the transaction in question was an exchange of stock for stock and computed the profit from such transaction accordingly whereas he should have determined that the transaction was a sale of his shares of stock in the Home Savings Bank for \$400.00 per share in cash plus the right to subscribe to four shares of stock of the American Security and Trust Company at \$100.00 per share, the value of such right being \$120.00 per share of the Trust Company stock, or a total of \$480.00 for each share of Bank stock sold, thus he sold each share of Bank stock for a total consideration of \$880.00.

21 (5) (a) Admits the allegations contained in subparagraph (a) of paragraph 5.

(b) Admits the allegations contained in subparagraph (b) of paragraph 5; and avers that the value of the right to purchase the shares of stock of the American Security and Trust Company for \$100.00 per share was \$120.00 per share.

(c) Admits that the agreement was carried out; and that the taxpayer received \$11,600.00 in cash; but avers that he also received \$13,920.00 in the form of a right to purchase 116 shares of Trust Company stock at \$100.00.

(d) Admits the allegations contained in subparagraph (d) of paragraph 5; but now avers that the computation of the profit was erroneous as hereinbefore alleged.

(6) Avers that heretofore; to wit, on July 31, 1926, the Board of Tax Appeals rendered its decision in the appeals of B. F. Saul et al., Docket Nos. 3244, 3245, 3652, 3736, 4224, 4826 and 4907; that the transaction in question in the instant appeal is precisely the same transaction that was before the Board in the aforementioned appeals, this taxpayer being one of the stockholders of the Home Savings Bank and B. F. Saul and the others aforementioned also being stockholders of the Home Savings Bank; that in the aforementioned appeals the Board held that the transaction in question was not an exchange of stock for stock under the provisions of Section 202 of the Revenue Act of 1918 but that it was a sale of stock of the Home Savings Bank under the provisions of the aforesaid Section and that the sellers received for each share of Home Savings Bank stock \$400.00 in cash and the right to subscribe to four shares of the stock of the American Security and Trust Company, the value of the right of each share being, \$120.00 or a total of \$480.00, thus resulting in a sale of the stock of the

22 Home Savings Bank for the total sum of \$880.00 per share; and by reference alleges as true each and every fact found by the Board in its decision in the appeals of B. F. Saul et al. as completely and fully as if set out verbatim herein insofar as the facts therein found are pertinent to the instant appeal, that is, excluding only those findings of fact relating solely to B. F. Saul, and the other stockholders therein mentioned.

Wherefore, it is prayed that the Board find that the taxpayer sold each share of its stock in the Home Savings

Bank for \$400.00 cash and the right to subscribe to four shares of stock of the American Security and Trust Company, the value of such right being \$480.00 and that it order the recomputation of the deficiency under Rule 50 in accordance with such findings.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

M. N. FISHER,
Special Attorney.

Now, January 9, 1929, the foregoing Amended Answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

23 United States Board of Tax Appeals.

Docket Nos. 10654, 10101.

JAMES F. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

HOWARD MORAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated April 13, 1928.

A disposition of stock under the circumstances of this appeal *held* to have been a sale under the provisions of section 202 (a) of the Revenue Act of 1918 and not an exchange of stock for stock under the provisions of section 202 (b) of that act. *Held, further*, that the fair market value of the right to subscribe for stock of another corporation received as a part of the consideration for the stock sold should be included in determining the gain or loss upon such sale.

George P. Hoover, Esq., and Laurence Graves, Esq., for the petitioners.

M. N. Fisher, Esq., for the respondent.

The Commissioner determined a deficiency of \$1,446.76 in respect of the tax of James F. Shea for the calendar year 1919 and a deficiency of \$323.78 in respect of the tax of Howard Moran for the calendar year 1919. The proceedings were consolidated for hearing and decision.

Petitioners claimed in the petition that the Commissioner erred in holding that the acquisition by the American Surety & Trust Company of certain stock owned by them in the Home Savings Bank, when the latter institution merged with the Trust Company, was an exchange of stock for stock under section 202 (b) of the Revenue Act of 1918. They claimed that the transaction was a sale by them of their stock to the Trust Company for \$400 a share.

A true copy. Test:

[Seal U. S. Court of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

24 Prior to the hearing of these proceedings, the Board decided the proceedings of *B. F. Saul et al.*, 4 B. T. A. 639, wherein it was held that under the contract between the Home Savings Bank, its stockholders, and the American Security & Trust Company the transaction wherein the Trust Company acquired the stock of the Home Savings Bank was a sale by the stockholders of their stock and that the fair market value of the right of the sellers of the Home Savings Bank stock to subscribe for four shares of stock of the Trust Company for each share of bank stock held by them at \$100 a share was a part of the consideration for the sale of the bank stock and should be included in computing the profit derived from such sale. The Commissioner amended his answer in these proceedings and admitted error in his original determination holding that the transaction was an exchange of stock for stock and alleged that it was a sale and that the profit derived by these petitioners from such sale should be determined in accordance with the Board's decision in *B. F. Saul et al.*, *supra*. There is little dispute as to the facts

in these proceedings but these petitioners claim that the Board's decision in the Saul case is erroneous insofar as it holds that more than \$400 cash received from the American Security & Trust Company should be considered in computing the profit upon the sale by them of their stock in the Home Savings Bank.

Findings of Fact.

Petitioners are residents of the District of Columbia.

At the time of the agreement of March 18, 1919, and other transactions hereinafter mentioned James F. Shea was the owner of ten shares of the capital stock of the Home Savings Bank, five shares of which were acquired prior to March 1, 1913, and, on that date, said five shares had a fair
25 market value of \$325 a share, which was higher than cost. The remaining five shares were acquired by him in 1919 at a cost of \$460 a share.

Howard Moran was the owner of 29 shares of the capital stock of the Home Savings Bank, all of which were acquired prior to March 1, 1913, and on that date had a fair market value of \$325 a share, which was higher than cost.

Each of the petitioners in his return for the year 1919 reported as profit the difference between the cost on March 1, 1913, value of the Home Savings Bank stock, which is not in dispute, and \$400 a share, the amount of cash received by them from the American Security & Trust Company. The transaction, hereinafter described in detail, was one in which these petitioners deposited their stock with trustees to whom the Trust Company, pursuant to the terms of a written contract, paid \$400,000 which amount was used by the trustees pursuant to the provisions of the contract in the purchase of 4,000 shares of the capital stock of the Trust Company at par, which they distributed to the taxpayers on the basis of four shares for each share formerly owned by them in the Home Savings Bank.

The Commissioner held that in substance the transaction was an exchange of stock for stock within the meaning of section 202 (b) of the Revenue Act of 1918 and computed the profit accordingly.

B. F. Saul, president of the Home Savings Bank, hereinafter referred to as the Bank, was approached early in 1919

by the president of the American Security & Trust Company, hereinafter referred to as the Trust Company, with a proposal to merge the Bank with the Trust Company. This proposal was considered and discussed by the directors of the Bank and negotiations followed which resulted in an offer by the Trust Company to take over the assets of the Bank in consideration of the assumption by the Trust Company of the Bank's liabilities, other than its liability to its stockholders, which the Trust Company agreed to satisfy by payment to the stockholders of \$400,000 and to permit the stockholders of the Bank to subscribe at par for four shares of its stock for each share of Bank stock owned by them.

The Bank had an authorized and outstanding capital stock of \$100,000, consisting of 1,000 shares which were owned by less than 50 stockholders. The offer of the Trust Company was made known to each stockholder of the Bank who was advised that under the proposed arrangement he would be paid cash for his stock at the rate of \$400 a share,

26 or, if he so desired, he would be permitted, upon the payment by the Trust Company of the \$400 a share, to purchase at par four shares of Trust Company stock for each share of Bank stock owned. Each stockholder evidenced a desire to acquire the Trust Company stock. Thereafter, on March 18, 1919, a formal written agreement was entered into between the Bank, the Bank stockholders, and the Trust Company, as follows:

This agreement, made this 18th day of March, A. D. 1919, by and between the stockholders of the Home Savings Bank, hereinafter referred to as the Stockholders; the Home Savings Bank, a corporation, hereinafter referred to as the Bank; B. Francis Saul, James F. Shea and Howard Moran, as Trustees, hereinafter referred to as the Trustees, and the American Security and Trust Company, hereinafter referred to as the Trust Company; witnesseth:

1. The Stockholders hereby agree as follows:

(a) To deposit with the Trustees hereinbefore named at the time of the signing of this contract, certificates of stock in the Bank then owned by them, assigned in blank to said trustees.

(b) To execute a proxy to the said Trustees to vote the stock so deposited by them at any subsequent meeting of

the Stockholders which may be specially called to consider the question of the merger of the Bank and the Trust Company, therein expressly waiving notice of any such meeting, and authorizing said Trustees at such meeting to vote to authorize the Directors of the Bank to pass such resolutions as may be necessary to effect said merger by the transfer of the assets of the Bank, including all of its real and personal property, to the Trust Company.

(c) To authorize said trustees to hold the stock of the Bank so deposited with said Trustees until the delivery to the Trustees by the Trust Company of four thousand (4,000) shares of its capital stock and then to hold the stock of the Bank subject to the direction of the Trust Company.

2. The Bank hereby agrees to call a special meeting of the Stockholders of the Bank for the purposes hereinbefore indicated, and, upon being directed by the Stockholders, to call a special meeting of the Board of Directors, to authorize the transfer of all the assets of the Bank to the Trust Company for and in consideration of the assumption by the Trust Company of all the liabilities of the Bank, other than its liabilities to its stockholders, and for and in consideration of the satisfaction of the interest of its stockholders by the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees.

27 3. The said Trustees hereby agree that after said stock of the Bank shall have been delivered to them and after the authorization of the stockholders and Board of Directors of the Bank for the transfer of its assets to said Trust Company and receipt by said Trustees of said sum of Four Hundred Thousand (\$400,000) Dollars, and upon delivery by said Trust Company of four thousand (4000) shares of its capital stock to them, they will pay to the Trust Company for said stock the sum of Four Hundred Thousand (\$400,000) Dollars and will hold the stock of the Bank subject to the direction of the Trust Company, and then will thereupon transfer to each stockholder of the Bank four shares of the stock of the Trust Company for each one share of the stock of the Bank delivered by such stockholders.

4. The Trust Company hereby agrees to call a special meeting of the stockholders of said Company for the purpose of increasing its capital stock from Three Million to

Three Million Four Hundred Thousand (\$3,400,000) Dollars. If the said increase is authorized by the stockholders, a special meeting of the Board of Directors will then be called for the purpose of the issuance of the four thousand (4000) shares of stock authorized to be issued by the stockholders, and for the purpose of authorizing and directing the merger of the Bank and the Trust Company by the transfer of the assets of the Bank to the Trust Company and the assumption by the Trust Company of all the debts and liabilities of the Bank other than liabilities to the stockholders of the Bank, and of the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees for the Stockholders, and for the purpose of authorizing the transfer of four thousand (4000) shares of the capital stock of the Trust Company issued as aforesaid to said Trustees for the sum of Four Hundred Thousand (\$400,000) Dollars.

This agreement was signed by all the stockholders of the Bank, for the Bank by its president, by the trustees for the Bank's stockholders, and by the Trust Company. Its terms were dictated with the intent and for the purpose of complying with and meeting the requirements of the law of the District of Columbia regulating the issuing of stock by trust companies organized thereunder.

The fair market value of the stock of the Trust Company on March 18, 1919, was \$220 a share.

On April 14, 1919, a meeting of the directors of the Trust Company was held at which a resolution was adopted, the pertinent portions of which were as follows:

28 Resolved, That it is the unanimous judgment of the Board that the merger of this Company with the Home Savings Bank in the manner and form provided in the proposed agreement between the stockholders of the Home Savings Bank, the trustees named in said agreement, and this Company, which said proposed agreement has been submitted to this Board by its Executive Committee, will be of great benefit to this Company, and ought, in the best interests of this Company, to be executed;

Resolved, That the officers of the Company be, and they hereby are authorized and directed to execute said agreement on behalf of this Company;

Resolved, further, that * * * a special meeting of the stockholders is hereby directed to be called * * * on the 14th day of April, 1919, * * * to consider a proposal to increase the capital stock of this Company from three million dollars to three million four hundred thousand dollars with the object and for the purposes stated in the proposed agreement above set forth; to consider and, if in the judgment of the stockholders such action ought to be taken, to approve and ratify the agreement dated the 18th day of March, 1919, above set forth, executed by the officers of the Company, pursuant to the direction contained in those resolutions; and further to consider and adopt such other and further resolutions as may be desirable or expedient in effecting the object and purposes of said agreement; * * *

On April 15, 1919, a meeting of the stockholders of the Trust Company was held for the purpose of considering the agreement hereinbefore mentioned and the action of the board of directors relative thereto. At this meeting the stockholders approved and ratified the action of the board of directors and the following resolution was adopted:

* * * Resolved, that in order to provide capital in amount sufficient and proper to carry into effect the agreement signed on the 18th day of March, 1919, by the stockholders of the Home Savings Bank, the Home Savings Bank, B. Francis Saul, James F. Shea, and Howard Moran, as trustees, and the American Security & Trust Company, that the capital stock of this company be increased from its present amount of three million dollars (\$3,000,000) to three million four hundred thousand dollars (\$3,400,000), said increase to consist of four thousand (4000) shares of the par value of \$100 each.

Resolved, that the stockholders of this Company do hereby authorize the said increase in the capital stock of this Company from three million dollars, consisting of thirty thousand shares of the par value of \$100 each to three million four hundred thousand dollars, consisting of thirty-four thousand shares of the par value of \$100 each.

Resolved, that the said four thousand shares of stock when issued shall be issued to the trustees named in the above mentioned agreement to carry out the object and purposes of said agreement, upon the payment to this Company of the sum of four hundred thousand dollars (\$400,000).

* * * * *

The stock of the Bank was not quoted on any stock exchange. The bid price for this stock on the Washington Stock Exchange was \$420 a share for 10 shares in January, 1919, and during the period from January to March 28, 1919, there were offers made through the Washington Stock Exchange to purchase the Bank stock at \$420 a share. Between the date of the Trust Company's offer to acquire the assets and stock of the Bank and before the transaction was consummated the vice president of the Bank purchased from the Bank's president five shares of stock at \$460 a share.

Between January 10 and April 16, 1919, the following sales of the Trust Company's stock were made on the Washington Stock Exchange:

Date.	Number of shares.	At.
Jan. 10.....	10	\$221
20.....	15	222
Feb. 8.....	20	222
Mar. 13.....	10	221
15.....	8	220
24.....	10	233
26.....	10	233
28.....	12	234
28.....	6	234
Apr. 1.....	2	236
16.....	5	237

On May 10, 1919, the Trust Company's stock sold for \$239 a share. On May 15, five shares were sold at \$240; on June 5, ten shares at \$243; and on June 10, two shares at \$239.

The terms of the agreement were carried out and the transaction, as consummated at the close of business on April 19, 1919, was executed in detail as follows:

30 The transfer, assignment and conveyance of all the assets of the Bank to the Trust Company, the assumption by the Trust Company of the Bank's liabilities, the issuance to and the receipt by the Trustees on behalf of the stockholders of the Bank of a check issued by the Trust Company for \$400,000, the delivery to the Trust Company of the 1,000 shares of the Bank stock by the trustees, the deposit by the trustees of the check for \$400,000 in the Riggs National Bank to the credit of their account, the drawing of a check on this account by the trustees for \$400,000 payable to the Trust Company, and the issuance and delivery by the Trust Company to the trustees for the stockholders of the Bank of a certificate for 4,000 shares of the Trust Company stock, the same being endorsed by the trustees and returned to the Trust Company with instructions to issue certificates to each of the former stockholders of the Bank. Pursuant thereto, each of the former stockholders of the Bank received a certificate for four shares of Trust Company stock for each share of Bank stock formerly owned by him.

It was necessary for the Trust Company, being a District of Columbia corporation, to obtain a certificate from the Comptroller of the Currency that its increased capital stock of \$400,000 had been paid in. In a letter dated April 21, 1919, the Trust Company notified the Comptroller of the authorization and issuance of the \$400,000 increased capital stock, and furnished him with a copy of the minutes of the meeting of its stockholders held April 14, 1919, in which was incorporated in full the agreement of March 18, 1919. On April 22, 1919, the Comptroller of the Currency issued a certificate that the \$400,000 of stock had been issued as required by law, as follows:

Whereas, satisfactory evidence has been transmitted to the Comptroller of the Currency that the capital stock of the American Security and Trust Company, located in the City of Washington, District of Columbia, has been increased in the sum of Four Hundred Thousand
31 Dollars (\$400,000), pursuant to the provisions of the Code of Law of the District of Columbia, and that the whole amount of such increase has been paid in, and that the paid-up capital stock of said company now amounts

to the sum of Three Million Four Hundred Thousand Dollars (\$3,400,000);

Now, it is hereby certified, that the capital stock of the American Security and Trust Company has been increased in the sum of Four Hundred Thousand Dollars (\$400,000); that said increase of capital has been paid in as a part of the capital stock; and that the said increase of capital is approved by the Acting Comptroller of the Currency.

In witness whereof, I hereunto affix my official signature and seal of office.

Each of the stockholders determined the profit or loss upon the sale of the Bank stock as the difference between the cost, or March 1, 1913, value thereof, and the sales price of \$400 a share. The Commissioner in his original determination held that the transaction was an exchange of stock for stock within the meaning of section 202 (b) of the Revenue Act of 1918 and determined the fair market value of the Trust Company's stock to have been \$235 a share, resulting in the deficiency hereinbefore mentioned. By amendment to his answer to the petitions herein the Commissioner now claims, in accordance with the Board's decision in the proceedings of *B. F. Saul et al.*, 4 B. T. A. 639, the transfer by petitioners of their stock to the American Security & Trust Company was a sale and that the profit upon the transaction should be computed by including as the consideration received for the bank stock \$400 a share—cash received, plus \$120, the fair market value of the right to subscribe to four shares of the Trust Company's stock at \$100 a share for each share of bank stock sold, making the total consideration received by the petitioners for each share of Home Savings Bank stock \$880 a share.

LITTLETON: The facts in these proceedings are the same as the facts before the Board in the proceeding of *B. F. Saul et al.*, decided by the Board and reported in 4 B. T. A. 639, and from which facts we have found that the fair market value of the right of petitioners to subscribe for four shares of the Trust Company's stock for each share of bank stock sold by them to the Trust Company at the time of the transaction was \$120 a share. In *B. F. Saul et al.*, *supra*, the Board said:

Although the Board is of the opinion that this transaction was a sale of stock by these taxpayers, it is not convinced that the profit realized by the stockholders of the Bank was the difference between the cost, or March 1, 1913, value of their stock, and \$400 a share. Under the terms of the agreement hereinbefore referred to, the Bank transferred its business and assets to the Trust Company in consideration of the assumption by the Trust Company of the Bank's liabilities other than its liability to stockholders. Under this contract the consideration passing from the Trust Company to each Bank stockholder for his Bank stock was \$400 a share and the right to subscribe for four shares of the Trust Company stock at \$100 a share. Between January 1, 1919, and March 18, 1919, the Trust Company's stock was selling on the market at prices ranging from \$220 a share to \$222 a share. Between March 24 and June 10, 1919, the stock of the Trust Company was sold on the exchange at prices ranging from \$233 a share to \$243 a share. The right of each Bank stockholder to purchase four shares of the Trust Company's stock at \$100 a share was a part of the consideration which the Trust Company agreed to pay for the Bank's stock, and the value of that right should be considered in measuring the profit realized by the Bank stockholders to the same extent as if it had been cash. The amount received by the Bank stockholders for their stock was, therefore, \$400 a share, plus the value of the right to subscribe for four shares of the Trust Company's stock at par.

Under the provisions of the contract and under all of the evidence submitted, the Board is of the opinion that the fair market price or value of the right received by each Bank stockholder to subscribe to the Trust Company's stock at par was \$120 a share. The result therefore is that the price received by each Bank stockholder for each share of Bank stock sold was \$400, plus \$480, the value of the right to subscribe for four shares of the Trust Company's stock, or \$880 a share. This amount, less the cost or March 1, 1913, value of the Bank stock, which is not in dispute, is the proper measure of the profit per share of the Bank to each of these taxpayers.

33 These petitioners contend that the Board was correct in its opinion in the *Saul* case in holding that

the transaction involved was a sale by the stockholders of the Bank of their stock to the Trust Company, but that the fair market value of the right of the Bank stockholders to subscribe for four shares of stock of the Trust Company for each share of the Bank stock sold should not have been considered in determining the profit to the Bank stockholders upon the sale of their stock to the Trust Company. The Board has considered the argument of counsel upon this point but cannot agree with the claim advanced in these proceedings.

Reviewed by the Board.

Judgment will be entered on 15 days' notice, under Rule 50.

Now, January 9, 1929, the foregoing Findings of Fact and Opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

34 United States Board of Tax Appeals.

Docket No. 10101.

HOWARD MORAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order of Redetermination.

Pursuant to the Board's findings of fact and opinion promulgated April 13, 1928, as amended by the Board's order of June 11, 1928, it is

Ordered and decided that there is a deficiency of \$229.29 in respect of the tax of this petitioner for the year 1919.

Enter:

(Signed) JOHN M. STERNHAGEN,
Member U. S. Board of Tax Appeals.

Washington, D. C., — — —.

Entered Jul. 27, 1928.

A true copy. Teste:

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Now, January 9, 1929, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

35

United States Board of Tax Appeals.

Docket No. 10654.

JAMES F. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order of Redetermination.

Pursuant to the Board's findings of fact and opinion promulgated April 13, 1928, as amended by the Board's order of June 11, 1928, it is

Ordered and decided that there is a deficiency of \$1,893.16 in respect of the tax of this petitioner for the calendar year 1919.

Enter:

(Signed.)

JOHN M. STERNHAGEN,

Member U. S. Board of Tax Appeals.

Washington, D. C., — — —.

Entered Jul. 27, 1928.

A true copy. Teste:

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Now, January 9, 1929, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Copy.

Filed Nov. 13, 1928, U. S. Board of Tax Appeals.

In the Court of Appeals of the District of Columbia.

10101.

HOWARD MORAN, Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.

10654.

JAMES F. SHEA, Petitioner,

vs.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Respondent.*Petition for Review of Decision of United States Board of
Tax Appeals.*

To the Honorables the Chief Justice and Associate Justices of the Court of Appeals of the District of Columbia:

Come now the petitioners, Howard Moran and James F. Shea, by their attorneys, and state that they are aggrieved by a decision, and order of redetermination, of the United States Board of Tax Appeals entered on the 27th day of June, 1928, in the cases of *Howard Moran vs. Commissioner of Internal Revenue*, No. 10,101 on the Docket of said Board, and *James F. Shea vs. Commissioner of Internal Revenue*, No. 10,654 on said Docket; and respectfully submit this their petition for a review thereof by the Court of Appeals of the District of Columbia, pursuant to the statute in such case made and provided:

37 1. The petitioners, Howard Moran and James F. Shea, are residents of the District of Columbia, and neither of them is an inhabitant of any judicial circuit of the United States other than the District of Columbia.

2. That the petitioners, and each of them, duly filed their separate Federal income tax returns for the calendar year 1919 with the Collector of Internal Revenue for the District of Maryland, at Baltimore, Maryland.

3. That, thereafter, the Commissioner of Internal Revenue made a determination of a deficiency of \$323.78 in the income tax liability of the petitioner Howard Moran for the year 1919, and likewise made a determination of a deficiency of \$1,446.76 in the income tax liability of the petitioner James F. Shea for the year 1919; that the deficiencies so determined were assessed and said petitioners notified thereof.

4. Thereafter, the petitioners, Howard Moran and James F. Shea, respectively filed in the United States Board of Tax Appeals their appeals from the deficiency so determined by the Commissioner of Internal Revenue.

Said appeals averred that the petitioner Howard Moran was the owner of 10 shares of the capital stock of the Home Savings Bank, and the petitioner James F. Shea was the owner of 29 shares of the capital stock of said bank; that the sale and disposition of said shares of stock pursuant to the terms of a certain agreement entered into March 18, 1919, by and between the Home Savings Bank, the
38 American Security and Trust Company, and B. Francis Saul, James F. Shea and Howard Moran, Trustees, was a sale of said stock within the meaning of Section 202-a of the Revenue Act of 1918, and not an exchange of said shares of stock within the meaning of Section 202b of the Revenue Act of 1918 as had theretofore been held by the Commissioner of Internal Revenue.

5. Thereafter, the Commissioner of Internal Revenue filed his answers to said petitions, in which answers he maintained that the said transaction was an exchange within the meaning of Section 202-b of the Revenue Act of 1918; and thereafter, first having obtained leave so to do, said Commissioner therein filed amended answers in which he maintained that the said transaction was a sale within the meaning of Section 202-a of the Revenue Act of 1918, and that in such sale petitioners for each share of the capital stock of the Home Savings Bank received the

sum of \$400 in cash and in addition thereto received the right to purchase shares of the capital stock of the American Security and Trust Company, which said right was of the value of \$480 for each share of the capital stock of the Home Savings Bank sold and disposed of by the petitioners.

6. Thereafter, the United States Board of Tax Appeals rendered a decision on said appeals in which it made findings of fact and conclusions of law, holding that the said transaction in the sale and disposition of the shares of the capital stock of the Home Savings Bank by the petitioners was a sale within the meaning of Section 39 202-a of the Revenue Act of 1918, and that in such sale petitioners received \$400 in cash for each share of the stock of the Home Savings Bank so sold and disposed of and in addition thereto received the right to purchase shares of the stock of the American Security and Trust Company, which said right was of the market value of \$480 for each share of the capital stock of the Home Savings Bank sold; and redetermined the deficiency on the appeal of said Howard Moran in the sum of \$229.29 in excess of the \$323.78 theretofore determined and assessed by the Commissioner, and on the appeal of said James F. Shea in the sum of \$1,893.16 in excess of the deficiency theretofore determined and assessed by the Commissioner in the amount of \$1,446.76.

7. Your petitioners believe and aver that errors were committed by the United States Board of Tax Appeals to their damage and prejudice, and assign the following errors:

(1). The Board erred in holding that in the sale and disposition of each share of the capital stock of the Home Savings Bank the petitioners, in addition to \$400 in cash, received the right to purchase shares of the stock of the American Security and Trust Company, which right was of the value of \$480, and accordingly that the amount received for each share was \$880.

(2). The Board erred in not holding that the petitioners in the sale and disposition of the capital stock of the Home Savings Bank received only the sum of \$400 for each

40 share of the capital stock of the Home Savings Bank
so sold and disposed of.

(3). The Board erred in holding that the right to purchase the shares of stock of the American Security and Trust Company represented income which was subject to tax under the Revenue Act of 1918.

(4). The Board erred in admitting and receiving in evidence the findings of fact made by said Board in the case of B. F. Saul, et al., Docket No. 3244, (4 B. T. A. 639), for the purpose of determining the fair market price or value of the rights acquired by the petitioners to purchase the capital stock of the American Security and Trust Company.

(5). The Board erred in determining that the right to acquire the stock of the American Security and Trust Company had a fair market price or value of \$480 for each share of the capital stock of the Home Savings Bank sold and disposed of by the petitioners, because there was no evidence in the case to justify such finding of fact.

(6). The Board erred in holding that the record of transactions respecting the sale of stock of the American Security and Trust Company was evidence to establish the fair market price or value of the right acquired by the petitioners to purchase the shares of stock of the American Security and Trust Company.

Wherefore, your petitioners pray that the decision of the United States Board of Tax Appeals rendered against them, and each of them, be reviewed and be reversed
41 by this honorable court, and for such other and further relief as the court may deem meet and proper in the premises.

HOWARD MORAN,
JAMES F. SHEA,

Petitioners,

By GEO. P. HOOVER,

Attorney.

GEO. P. HOOVER,

LAURENCE GRAVES,

Attorneys for Petitioners.

DISTRICT OF COLUMBIA, ss:

George P. Hoover first being duly sworn, on oath says that he is attorney for the petitioners, Howard Moran and James F. Shea; that he knows the contents of the foregoing petition; that to the best of his knowledge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

GEO. P. HOOVER.

Subscribed and sworn to before me this 5th day of November, 1928;

GEO. C. OBER, JR.,
Notary Public, D. C.

(Notary Seal Here.)

42 Filed Nov. 13, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10101.

EDWARD MORAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 10654.

JAMES F. SHEA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Notice.

To David H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.:

You are hereby notified that the above named petitioners, on or about, to wit, the 13th day of November, 1928, filed with the United States Board of Tax Appeals, Washington,

D. C., their petition for review by the Court of Appeals for the District of Columbia of the decision of the United States Board of Tax Appeals in the above entitled cases, which decision was rendered on the 27th day of June, 1928. A copy of said petition for review is handed you herewith.

GEO. P. HOOVER,
LAURENCE GRAVES,
Attorneys for Petitioners.

Received a signed duplicate of the foregoing notice together with a copy of the petition for review therein referred to this 15th day of November, 1928.

C. M. CHAREST,
*General Counsel Bureau of Int. Rev.,
Attorney for David H. Blair,
Commissioner of Internal Revenue.*

Now, January 9, 1929, the foregoing petition for Review with proof of service thereof certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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Filed Jan. 7, 1929.

United States Board of Tax Appeals.

Docket No. 10101.

HOWARD MORAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 10654.

JAMES F. SHEA, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of Evidence.

Be it remembered that the above-entitled causes were consolidated, and came on for hearing on June 8, 1927, be-

fore Hon. William R. Green, Member of the United States Board of Tax Appeals, sitting as a division of said Board, whereupon the following proceedings were had, evidence adduced by the respective parties, and rulings made by the said Board:

Whereupon, to maintain the issues on their part joined, the petitioners called as a witness **B. Francis Saul**, who testified as follows: My full name is B. Francis Saul. I am now and have for a number of years been a resident of the District of Columbia and engaged in the Banking business and real estate in said District. In 1919 I was president of the Home Savings Bank, and had been for 19 years prior to that time. The capitalization of the Home Savings

44 Bank was \$100,000, divided into 1,000 shares of \$100 par value each; some time prior to February, 1919,

I did have conversations with Mr. Charles J. Bell, president of the American Security and Trust Company, of Washington, D. C., with respect to the possible merger of the Home Savings Bank and the American Security and Trust Company; we discussed it a number of times. I also discussed the matter with the members of the board of directors of the Home Savings Bank some time prior to the agreement executed March 18, 1919; I also took the matter up with the stockholders of the Home Savings Bank. The negotiations culminated in an agreement, to which I was a party.

A copy of said agreement, dated March 18, 1919, was shown to the witness and identified by him. Thereupon the said agreement was offered in evidence, marked, Petitioners' Exhibit No. 1, and is in words and figures, as follows:

This agreement, made this 18th day of March, A. D. 1919, by and between the stockholders of the Home Savings Bank, hereinafter referred to as the Stockholders; the Home Savings Bank, a corporation, hereinafter referred to as the Bank; B. Francis Saul, James F. Shea and Howard Moran, as Trustees, hereinafter referred to as the Trustees, and the American Security and Trust Company, hereinafter referred to as the Trust Company: witnesseth:

1. The Stockholders hereby agree as follows:

(a) To deposit with the Trustees hereinbefore named at the time of the signing of this contract, certificates of stock

in the Bank then owned by them, assigned in blank to said trustees.

(b) To execute a proxy to the said Trustees to vote the stock so deposited by them at any subsequent meeting of the Stockholders which may be specially called to consider the question of the merger of the Bank and the Trust Company, therein expressly waiving notice of any such meeting, and authorizing said Trustees at such meeting to vote to authorize the Directors of the Bank to pass such resolutions as may be necessary to effect said merger by the transfer of the assets of the Bank, including all of its real and personal property, to the Trust Company.

(c) To authorize said trustees to hold the stock of the Bank so deposited with said Trustees until the delivery to the Trustees by the Trust Company of four thousand (4,000) shares of its capital stock and then to hold the stock of the Bank subject to the direction of the Trust Company.

2. The Bank hereby agrees to call a special meeting of the Stockholders of the Bank for the purposes hereinbefore indicated, and, upon being directed by the Stockholders, to call a special meeting of the Board of Directors, to authorize the transfer of all the assets of the Bank to the Trust Company for and in consideration of the assumption by the Trust Company of all the liabilities of the Bank, other than its liabilities to its stockholders, and for and in consideration of the satisfaction of the interest of its stockholders by the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees.

3. The said Trustees hereby agree that after said stock of the Bank shall have been delivered to them and after the authorization of the stockholders and Board of Directors of the Bank for the transfer of its assets to said Trust Company and receipt by said Trustees of said sum of Four Hundred Thousand (\$400,000) Dollars, and upon delivery by said Trust Company of four thousand (4000) shares of its capital stock to them, they will pay to the Trust Company for said stock the sum of Four Hundred Thousand (\$400,000) Dollars and will hold the stock of the Bank subject to the direction of the Trust Company, and then will thereupon transfer to each stockholder of the Bank four shares of the stock of the Trust Company for each one

share of the stock of the Bank delivered by such stockholder.

4. The Trust Company hereby agrees to call a special meeting of the stockholders of said Company for the purpose of increasing its capital stock from Three Million to Three Million Four Hundred Thousand (\$3,400,000) Dollars. If the said increase is authorized by the stockholders, a special meeting of the Board of Directors will then be called for the purpose of the issuance of the four thousand (4000) shares of stock authorized to be issued by the stockholders, and for the purpose of authorizing and directing the merger of the Bank and the Trust Company by the transfer of the assets of the Bank to the Trust Company and the assumption by the Trust Company of all the debts and liabilities of the Bank other than liabilities to the stockholders of the Bank, and of the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees for the Stockholders, and for the purpose of authorizing the transfer of four thousand (4000) shares of the capital stock of the Trust Company issued as aforesaid to said trustees for the sum of Four Hundred Thousand (\$400,000) Dollars.

* * * * *

The witness, continuing, testified that he remembers as a fact that he, James F. Shea and Howard Moran were named as trustees to act as trustees for the stockholders of the Home Savings Bank. The terms of the agreement were carried out. A check for \$400,000 was paid by
46 the American Security and Trust Company to us as trustees, and I think we then deposited that, and then the stock was issued in the name of the trustees; that is, 4,000 shares of the stock of the American Security and Trust Company was issued in the name of the three trustees, and then that was canceled, rather—transferred to the company with instructions to issue new stock in the ratio of 4 to 1 for the stockholders of the Home Savings Bank. The trustees received from the American Security and Trust Company \$400,000 for the 1,000 shares of the Home Savings Bank, and that amount was deposited in some banking institution, I think it was the Riggs Bank, and I think we drew a check for the same amount, \$400,000, I

presume payable to the American Security and Trust Company, or perhaps payable to the trustees. I do not remember the details of that now; however, we were advised by the attorneys; and that was turned into the American Security and Trust Company with the request that in the place of one certificate for 4,000 shares it issue new certificates as per list to the former owners of the Home Savings Bank stock. The trustees paid to the American Security and Trust Company \$400,000, for which it issued to the trustees 4,000 shares of its stock, and then the trustees surrendered that certificate of stock and the American Security and Trust Company issued new stock in the names of the Home Savings Bank Stockholders, in the ratio of 4 to 1.

Thereupon the witness identified a check, dated April 19, 1919, in the sum of \$400,000, made by the American Security and Trust Company, payable to the order of B.

Francis Saul, Howard Moran and James F. Shea,
47 Trustees, which was duly endorsed, and deposited by said Trustees on April 19, 1919, in the Riggs National Bank. Thereupon the witness identified a deposit slip of the Riggs National Bank, dated April 19, 1919, showing the deposit of the sum of \$400,000 by said trustees. Thereupon, there was introduced in evidence photostatic copy of the individual ledger account of the Riggs National Bank with B. Francis Saul, Howard Moran and James F. Shea, Trustees, showing the deposit of \$400,000 in said bank. Thereupon, on cross-examination the witness testified as follows: The trustees drew out this deposit of \$400,000 that was made in the Riggs National Bank. We must have drawn it out by check payable to the American Security and Trust Company. I have not a copy of that check. I notice the entry here is April 19. I cannot say without refreshing my memory what the date of the check was and I have not refreshed my memory on it, but I presume it was April 19. In fact, I believe this statement shows under the head of Deposits, April 19, 1919, \$400,000, and under the head of Checks, April 19, 1919, \$400,000; so it is evidently the same day. None of the stockholders of the Home Savings Bank under this contract took \$400 per share for their stock without taking the stock of the American Security and Trust Company. They all took the stock.

Q. If one of the stockholders of the Bank had demanded that you, as trustee, deliver his prorata portion of this \$400,000 cash to him, would have done so?

Mr. Hoover: I object to that as immaterial, if the Court please; as to whether any demand was made upon
48 him outside of the terms of the contract we submit is wholly irrelevant to this proceeding.

The Member: Sustained.

Mr. Fisher: I will note an exception.

As to whether I did sell any stock of the Home Savings Bank at or about the time of this transaction, my recollection is, I sold 5 shares to Mr. Moran. I could not say approximately what date that was but I should judge within a month or two months previous to this contract; it might have been within a week or two. I have not refreshed my memory as to the price at which I sold these shares to Mr. Moran, but I think it was \$460 a share. The transaction that is involved in these cases in which I am now testifying, that is the appeals of Howard Moran and James F. Shea, and the general transaction involving stock of the Bank and stock of the Trust Company is the same transaction that was involved in my personal appeal tried before the Board at an earlier date.

Thereupon, further to maintain the issues on their part joined, the petitioners called as a witness **Howard Moran**, who testified as follows: My full name is Howard Moran. I am now one of the Vice-presidents of the American Security and Trust Company, and was Vice-president and director of the Home Savings Bank during the year 1919. Mr. Saul discussed with me the matter of the negotiations looking to a merger of said Savings Bank with the American Security and Trust Company, prior to the time the agreement was entered into. We merely discussed it, that was all. There wasn't any particular mention as to the terms or anything of the kind. I discussed the matter with the other directors of the Home Savings Bank, and I approached a number of the stockholders and discussed it
49 with them. I am familiar with the terms of the agreement dated March 18, 1919, which has been offered in evidence in this proceeding, and marked Petitioners' Exhibit No. 1. I am a party to that agree-

ment. I was at that time a shareholder of the Home Savings Bank being the owner of 10 shares, 5 shares of which I acquired prior to March 1, 1913, and I cannot tell the exact date I purchased the latter 5 shares, but within a very short time of the signing of this agreement. I purchased the 5 shares from Mr. Saul. As appears by the agreement, I was one of the trustees who represented the stockholders of the Home Savings Bank in the consummation of this transaction, and I acted in that capacity. I remember the transaction was closed on April 19, 1919. On that date there was delivered to us as trustees for the stockholders of the Home Savings Bank 1,000 shares of the Home Savings Bank stock, the certificate of stock endorsed to us. That was endorsed in blank and delivered to the American Security and Trust Company. From them we received a check for \$400,000 to our order as trustees. That check for \$400,000 we deposited in the Riggs National Bank. We then drew a check for \$400,000, which we delivered to the American Security and Trust Company, and for that we received a certificate of stock from the American Security and Trust Company for 4,000 shares to our order as trustees. That was endorsed in blank and returned to the American Security and Trust Company with the request that they transfer the shares to the stockholders of the Home Savings Bank in accordance with the agreement, or 4 shares for 1. That was done; a list was given them of the stockholders. As a shareholder of the Home Savings Bank

50 I received a certificate for 40 shares of the American Security and Trust Company's stock, and the shares coming to the other shareholders were distributed by the trustees after having been made out to them respectively by the American Security and Trust Company. I still retain the stock of the American Security and Trust Company that I acquired. I have not disposed of any part of the stock. I filed my income tax return for the year 1919 with the Collector of Internal Revenue, Baltimore, Maryland, and after that I received a notice of the determination of the deficiency by the Commissioner of Internal Revenue, and from that I have appealed to this Board in this proceeding. I am an officer of the American Security and Trust Company at the present time, being a Vice-president, and I know that Mr. Shea is still the holder of the

shares which he acquired in the transaction which I have been speaking about.

It was stipulated and agreed between counsel for the respective parties that at the time of the consummation of the transaction in question Mr. Shea was the owner of 29 shares of the capital stock of the Home Savings Bank.

Thereupon, on cross-examination the witness testified as follows: The check for \$400,000, which was payable to the trustees, was the check of the American Security and Trust Company, and the American Security and Trust Company was the payee named in the trustees' check for \$400,000. The trustees received the American Security and Trust Company's check on April 19, and on that date issued their check to the American Security and Trust Company. The transaction in my case and that of Mr. Shea is similar to the transaction involved in the case of Mr. Saul in
51 which I testified before this Board. In the purchase of the 5 shares from Mr. Saul I paid him \$2300, or \$460 a share.

Thereupon, petitioners offered in evidence photostatic copy of the minutes of a special meeting of the stockholders of the American Security and Trust Company held on April 14, 1919, which are in words and figures as follows:

Resolved, that in order to provide capital in amount sufficient and proper to carry into effect the agreement signed on the 18th day of March, 1919, by the stockholders of the Home Savings Bank, the Home Savings Bank, B. Francis Saul, James F. Shea, and Howard Moran, as trustees, and the American Security and Trust Company, that the capital stock of this company be increased from its present amount of three million dollars (\$3,000,000) to three million four hundred thousand dollars (\$3,400,000), said increase to consist of four thousand (4,000) shares of the par value of \$100 each.

Resolved, that the stockholders of the Company do hereby authorize the said increase in the capital stock of this Company from three million dollars, consisting of thirty thousand shares of the par value of \$100 each to three million four hundred thousand dollars, consisting of thirty four thousand shares of the par value of \$100 each.

Resolved, that the said four thousand shares of stock when issued shall be issued to the trustees named in the

above mentioned agreement to carry out the object and purposes of said agreement, upon the payment to this Company of the sum of four hundred thousand dollars (\$400,000).

* * * * *

Thereupon, petitioners introduced in evidence the following letters:

52 "American Security and Trust Company.

 "Chas. J. Bell, President.

 "Washington, D. C., April 21, 1919.

"To the Comptroller of the Currency,
Washington, D. C.

"DEAR SIR:

"The capital stock of the American Security and Trust Company of the District of Columbia, having been increased, by vote of two-thirds of the stockholders, at a meeting of the stockholders held on the 14th day of April, 1919, at the office of the Company, in conformity with the provisions of the Code of Laws of the District of Columbia, to Three Million, Four Hundred Thousand Dollars (\$3,400,000), I present herewith my certificate certifying to the said increase and to the fact that the paid-up capital stock of the Company now amounts to Three Million Four Hundred Thousand Dollars (\$3,400,000); also my certificate showing the vote of the shareholders authorizing said increase.

"I hand you herewith to be deposited in your office to cover said increase of capital stock as required by law, thirteen registered bonds of the United States, of the Third Liberty Loan, maturing September 15, 1928, in the sum of \$10,000 each, and one registered bond of the United States of the Third Liberty Loan, maturing September 15, 1928, in the sum of \$5,000, aggregating in value more than one-fourth of the amount of the increase of capital.

 "Yours very truly,
(Signed)

 "C. J. BELL,
 "President."

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“Treasury Department.

“Office of Comptroller of the Currency.

“Washington, D. C., April 22, 1919.

“Mr. Charles J. Bell,

President American Security and Trust Company,
Washington, D. C.

“SIR:

“Receipt is acknowledged of your letter of April 21, inclosing report of the resolution passed by shareholders of the American Security and Trust Company on April 14, 1919, authorizing an increase of the capital stock of your association from \$3,000,000. to \$3,400,000. and your certificate of payment of the increase.

“You will find inclosed certificate of the Acting Comptroller of the Currency which has been issued today approving the increase of capital stock of your association.

“Respectfully,

(Signed)

“ T. P. KANE,
“*Acting Comptroller*”.

“Treasury Department.

“Office of the Comptroller of the Currency.

“Washington, D. C., April 22, 1919.

“Whereas, satisfactory evidence has been transmitted to the Comptroller of the Currency that the capital stock of the American Security and Trust Company, located in the City of Washington, District of Columbia, has been increased in the sum of Four Hundred Thousand Dollars (\$400,000) pursuant to the provisions of the Code of Law of the District of Columbia, and that the whole amount of such increase has been paid, in and that the paid-up capital stock of said Company now amounts to the sum of Three Million Four Hundred Thousand Dollars (\$3,400,000);

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“Now, it is hereby certified, that the capital stock of the American Security and Trust Company has been increased in the sum of Four Hundred Thousand Dol-

lars (\$400,000); that said increase of capital has been paid in as a part of the capital stock; and that the said increase of capital is approved by the Acting Comptroller of the Currency.

"In witness whereof, I hereunto affix my official signature and seal of office.

(Signed)

"T. P. KANE,

[SEAL.]

"Acting Comptroller of the Currency."

55 Thereupon, further to maintain the issues on their part joined, the petitioners called as a witness **G. Percy McGlue**, who testified as follows: My full name is G. Percy McGlue. I am now engaged in the active practice of law in the District of Columbia, and have been so engaged for about 28 years. I was attorney for the Home Savings Bank in the year 1919, and was also a director and shareholder of that bank. I do recall a discussion having for its object the merger of the Home Savings Bank and the American Security and Trust Company. In connection with that I did participate in a draft of what ultimately resulted in the agreement between those institutions and the stockholders of the Home Savings Bank. Clarence R. Wilson, who is now dead, represented the American Security and Trust Company in that transaction. I have seen a copy of the agreement, which was offered in evidence in this proceeding, marked Petitioners' Exhibit No. 1, being dated March 18, 1919. Mr. Wilson and I together prepared the draft of that agreement. The form of the agreement was insisted upon by Mr. Wilson, representing the American Security and Trust Company, because of the fact of the provisions of the Code of Law of the District of Columbia which prevented that company from disposing of its stock for anything but cash. The several sections of the Code to which I refer and which we had in mind at the time of this transaction are Sections 719, 728, 735 and 743.

56 Thereupon, it was stipulated and agreed between counsel for the respective parties that the income tax return of Mr. Shea was filed in Baltimore, and that the value of the stock of the Home Savings Bank as of March 1, 1913, was \$331.44 a share.

Thereupon, the petitioners announced their case in chief closed.

Mr. Fisher: On behalf of the Commissioner I would like to introduce in evidence the supporting allegations contained in the amended answer to the findings of fact of the Board, and the opinion in so far as it states facts in the case of B. F. Saul, et al., Docket No. 3244, being reported in 4, BTA, 639, but I would like to offer in evidence, one of the usual mimeograph copies of the Board's decision.

Mr. Hoover: We shall have to object to that, if your Honor please, on the ground that the findings of fact in another case between other parties, in which case we were not a party to the record, could have no relevancy in our case, and certainly is irrelevant and immaterial. We are trying a separate and distinct case, and we have issues which are framed in this case. The findings of fact by the Court in another case are certainly not evidence as to the facts which are in issue in this case. Therefore we object to it.

Mr. Fisher: If your Honor please, the witnesses have testified and it has been admitted that the transaction involving the stock of the Home Savings Bank and the stock of the American Security and Trust Company which
57 was in question in the case of B. F. Saul is the same transaction that is here in question. The Board has found certain facts relative to that transaction. It has found the market values, or sales price at various dates of the stock of the Trust Company, and we submit that these facts are prima facie true for this transaction whenever it may come before the Board, and we therefore think that the Board's findings of fact are admissible in evidence, bearing in mind that the transaction here in question is concededly the same transaction that was before the Board in the B. F. Saul case.

The Member: How much difference does it make, Mr. Fisher, whether I rule on that now or, we will say, after the noon recess? Does it have any effect on the presentation of your case?

Mr. Fisher: It has this effect, your Honor; that we are relying upon the market quotations of the American Security & Trust Company stock as set out in this finding of fact in the Saul appeal.

The Member: As to that, no doubt counsel will stipulate.

Mr. Fisher: If counsel will stipulate that the market values—I mean the sales prices, with the record of sales, that were found by the Board in the Saul case, then that will be agreeable to us.

Mr. Hoover: I regret that we will be unable to stipulate as to that, for this reason; that we maintain that whatever was acquired under the terms of this agreement, according to the position taken by the government, or the Commissioner, that we acquired a right which was of value, 58 we maintain the question of what the shares of the American Security & Trust Company were selling for is not evidence of the value of this right, when this right could not have been disposed of and there was no market for the right. This right was not transferrable and was not negotiable. It could not have been sold and could not have been realized upon. Therefore we say it was not income or gain, and consequently was not subject to any tax.

Mr. Fisher: That merely, if your Honor please, refers to the competency of these facts as evidence of the value of the right. It has nothing to do with the truth of the facts.

The Member: Let me see the precise finding to which you refer. I take it you refer to the tabulation of sales appearing at the top?

Mr. Fisher: Yes, sir, the tabulation and some additional sales mentioned in the text below the tabulation.

The Member: Mr. Hoover, are you willing to stipulate, subject to the objections you have indicated that these sales were made at the times and the prices set out in the finding of fact in the B. F. Saul case?

Mr. Hoover: With the understanding that we reserve our objection on the record, and by consenting that this may be used in lieu of witnesses being called to testify to that; it being further received over our objection and subject to our exception. With that understanding, it may go in.

Mr. Fisher: Subject to the same objections as might be made if we called a witness to testify to these facts?

Mr. Hoover: If you called a witness to testify that 59 these sales were made on the Stock Exchange, we would make the objections I have already stated. Without waiving such objections we would have no objection to this being used in lieu of the testimony of a witness if he were on the stand.

The Member: Does that satisfy your requirement?

Mr. Fisher: That is satisfactory.

The Member: Very well, the tabulation of sales appearing at the top of page 7 of the Board's mimeograph of the B. F. Saul appeal, detailing sales, date and amount received, including those made on May 10th and May 15th, referred to immediately below the tabulation, will be received in evidence, and treated as if a witness had so testified, subject to the objections reserved by counsel, and an exception will be noted if it be adverse to the position taken by counsel.

Mr. Hoover: That is satisfactory to me.

(The tabulation referred to immediately above, is as follows:)

"Between January 10 and April 16, 1919, the following sales of the Trust Company's stock were made on the Washington Stock Exchange:

Date.	Number of shares.	At.
Jan. 10, 1919	10	\$221
20, 1919	15	222
Feb. 8, 1919	20	222
Mar. 13, 1919	10	221
60		
Mar. 15, 1919	8	\$220
24, 1919	10	233
26, 1919	10	233
28, 1919	12	234
28, 1919	6	234
April 1, 1919	2	236
16, 1919	5	237

On May 10, 1919, the Trust Company's stock sold for \$239 a share. On May 15, five shares were sold at \$240; on June 5, 10 shares at \$243, and on June 10, 2 shares at \$239."

Thereupon, the respondent announced his case closed.

And be it remembered that the foregoing contains the substance of all the evidence given on the hearing of the said causes before the Board of Tax Appeals, and together with the pleadings and the record is all that was considered by the Board as the basis of its final order and decision rendered herein.

Whereupon, for the purpose of review by the Court of Appeals of the District of Columbia of said decision, the foregoing statement of evidence is accordingly approved and signed this 7 day of January 1929:

By the Board:

BENJ. H. LITTLETON,
Member of the United States Board of Tax Appeals.

Now, January 9, 1929, the foregoing Statement of Evidence certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Considered and approved.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

61 Filed Nov. 13, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10101.

HOWARD MORAN, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 10654.

JAMES F. SHEA, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe.

To B. D. Gamble,
Clerk of the United States Board of Tax Appeals,
Washington, D. C.

SIR:

Please prepare and transmit to the Court of Appeals of the District of Columbia, as and for a transcript of the rec-

ord upon the petition for review in the above entitled cases, copies of the following:

1. The docket entries of proceedings before the Board.
2. Pleadings before the Board.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review.
5. The statement of evidence.

GEO. P. HOOVER,
LAURENCE GRAVES,
Attorneys for Petitioners.

Service of the foregoing præcipe is hereby admitted this 15th day of November, 1928.

(Signed) C. M. CHAREST,
*General Counsel of Int. Rev. Bureau,
Attorney for David H. Blair,
Commissioner of Internal Revenue.*

Now, January 9, 1929, the foregoing Præcipe certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 4907. Howard Moran, appellant, vs. Commissioner of Internal Revenue. And No. 4908. James F. Shea, appellant, vs. Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Jan. 12, 1929. Henry W. Hodges, clerk.

Nos. 4907 and 4908 MAY 6 - 1929

Henry W. Hodges

In the Court of Appeals of the District
of Columbia

HOWARD MORAN, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

JAMES F. SHEA, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

APPEALS FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

MABEL WALKER WILLEBRANDT,

Assistant Attorney General.

J. LOUIS MONARCH,

Special Assistant to the Attorney General.

HARVEY R. GAMBLE,

Special Assistant to the Attorney General.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

PREW SAVOY,

Special Attorney,

Bureau of Internal Revenue,

Of Counsel.

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**In the Court of Appeals of the District
of Columbia**

No. 4907

HOWARD MORAN, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

No. 4908

JAMES F. SHEA, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

APPEALS FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

PREVIOUS OPINION

The only previous opinion in these cases is that of the United States Board of Tax Appeals (R. 19-30), which is reported in 11 B. T. A. 557.

JURISDICTION

These appeals involve income-tax deficiencies for the year 1919, and are taken from orders of

redetermination of the Board of Tax Appeals entered July 27, 1928. (R. 30-31.) The cases are brought to this Court by a single petition for review, filed November 13, 1928 (R. 32-35), pursuant to the provisions of the Revenue Act of 1926. (Act of February 26, 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109-110.)

QUESTION PRESENTED

1. What was the amount of the profit realized by appellants from the sale of their stock in the Home Savings Bank of Washington, D. C., in 1919, for cash and for the right to purchase stock of the American Security and Trust Company?

THE STATUTES

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

(b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to

the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged.

THE FACTS

The facts as found by the Board are as follows (R. 21-28):

Petitioners are residents of the District of Columbia.

At the time of the agreement of March 18, 1919, and other transactions hereinafter mentioned,

James F. Shea was the owner of ten shares of the capital stock of the Home Savings Bank, five shares of which were acquired prior to March 1, 1913, and on that date said five shares had a fair market value of \$325 a share, which was higher than cost. The remaining five shares were acquired by him in 1919 at a cost of \$460 a share.

Howard Moran was the owner of 29 shares of the capital stock of the Home Savings Bank, all of which were acquired prior to March 1, 1913, and on that date had a fair market value of \$325 a share, which was higher than cost.

Each of the petitioners in his return for the year 1919 reported as profit the difference between the cost or March 1, 1913, value of the Home Savings Bank stock, which is not in dispute, and \$400 a share, the amount of cash received by them from the American Security & Trust Company. The transaction, hereinafter described in detail, was one in which these petitioners deposited their stock with trustees to whom the Trust Company, pursuant to the terms of a written contract, paid \$400,000, which amount was used by the trustees pursuant to the provisions of the contract in the purchase of 4,000 shares of the capital stock of the Trust Company, at par, which shares they distributed to the taxpayers on the basis of four shares for each share formerly owned by them in the Home Savings Bank.

The Commissioner held that in substance the transaction was an exchange of stock for stock,

within the meaning of Section 202 (b) of the Revenue Act of 1918, and computed the profit accordingly.

B. F. Saul, President of the Home Savings Bank, hereinafter referred to as the Bank, was approached early in 1919 by the President of the American Security & Trust Company, hereinafter referred to as the Trust Company, with a proposal to merge the Bank with the Trust Company. This proposal was considered and discussed by the directors of the Bank and negotiations followed which resulted in an offer by the Trust Company to take over the assets of the Bank in consideration of the assumption by the Trust Company of the Bank's liabilities, other than its liability to its stockholders, which the Trust Company agreed to satisfy by payment to the stockholders of \$400,000 and to permit the stockholders of the Bank to subscribe at par for four shares of its stock for each share of Bank stock owned by them.

The Bank had an authorized and outstanding capital stock of \$100,000, consisting of 1,000 shares which were owned by less than 50 stockholders. The offer of the Trust Company was made known to each stockholder of the Bank who was advised that under the proposed arrangement he would be paid cash for his stock at the rate of \$400 a share, or, if he so desired, he would be permitted, upon the payment by the Trust Company of the \$400 a share, to purchase at par four shares of Trust Company

stock for each share of Bank stock owned. Each stockholder evidenced a desire to acquire the Trust Company stock. Thereafter, on March 18, 1919, a formal written agreement was entered into between the Bank, the Bank's stockholders, and the Trust Company, as follows:

This agreement, made this 18th day of March, A. D. 1919, by and between the stockholders of the Home Savings Bank, hereinafter referred to as the Stockholders; the Home Savings Bank, a corporation, hereinafter referred to as the Bank; B. Francis Saul, James F. Shea, and Howard Moran, as Trustees, hereinafter referred to as the Trustees, and the American Security and Trust Company, hereinafter referred to as the Trust Company; witnesseth:

1. The Stockholders hereby agree as follows:

(a) To deposit with the Trustees hereinbefore named at the time of the signing of this contract, certificates of stock in the Bank then owned by them, assigned in blank to said trustees.

(b) To execute a proxy to the said Trustees to vote the stock so deposited by them at any subsequent meeting of the Stockholders which may be specially called to consider the question of the merger of the Bank and the Trust Company, therein expressly waiving notice of any such meeting, and authorizing said Trustees at such meeting to vote to authorize the Directors of the Bank

to pass such resolutions as may be necessary to effect said merger by the transfer of the assets of the Bank, including all of its real and personal property, to the Trust Company.

(c) To authorize said trustees to hold the stock of the Bank so deposited with said Trustees until the delivery to the Trustees by the Trust Company of four thousand (4,000) shares of its capital stock and then to hold the stock of the Bank subject to the direction of the Trust Company.

2. The Bank hereby agrees to call a special meeting of the Stockholders of the Bank for the purposes hereinbefore indicated, and, upon being directed by the Stockholders, to call a special meeting of the Board of Directors, to authorize the transfer of all the assets of the Bank to the Trust Company for and in consideration of the assumption by the Trust Company of all the liabilities of the Bank, other than its liabilities to its stockholders, and for and in consideration of the satisfaction of the interest of its stockholders by the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees.

3. The said Trustees hereby agree that after said stock of the Bank shall have been delivered to them and after the authorization of the stockholders and Board of Directors of the Bank for the transfer of its assets to said Trust Company and receipt by said Trustees of said sum of Four Hundred

Thousand (\$400,000) Dollars, and upon delivery by said Trust Company of four thousand (4,000) shares of its capital stock to them, they will pay to the Trust Company for said stock the sum of Four Hundred Thousand (\$400,000) Dollars and will hold the stock of the Bank subject to the direction of the Trust Company, and then will thereupon transfer to each stockholder of the Bank four shares of the stock of the Trust Company for each one share of the stock of the Bank delivered by such stockholders.

The Trust Company hereby agrees to call a special meeting of the stockholders of said Company for the purpose of increasing its capital stock from Three Million to Three Million Four Hundred Thousand (\$3,400,000) Dollars. If the said increase is authorized by the stockholders, a special meeting of the Board of Directors will then be called for the purpose of the issuance of the four thousand (4,000) shares of stock authorized to be issued by the stockholders, and for the purpose of authorizing and directing the merger of the Bank and the Trust Company by the transfer of the assets of the Bank to the Trust Company and the assumption by the Trust Company of all the debts and liabilities of the Bank other than liabilities to the stockholders of the Bank, and of the payment of the sum of Four Hundred Thousand (\$400,000) Dollars to the Trustees for the Stockholders, and for the purpose of authorizing the transfer of four thousand

(4,000) shares of the capital stock of the Trust Company issued as aforesaid to said Trustees for the sum of Four Hundred Thousand (\$400,000) Dollars.

This agreement was signed by all the stockholders of the Bank, for the Bank by its president, by the trustees for the Bank's stockholders, and by the Trust Company. Its terms were dictated with the intent and for the purpose of complying with and meeting the requirements of the law of the District of Columbia regulating the issuing of stock by trust companies organized thereunder.

The fair market value of the stock of the Trust Company on March 18, 1919, was \$220 a share.

On April 14, 1919, a meeting of the directors of the Trust Company was held at which a resolution was adopted, the pertinent portions of which were as follows:

Resolved, That it is the unanimous judgment of the Board that the merger of this Company with the Home Savings Bank in the manner and form provided in the proposed agreement between the stockholders of the Home Savings Bank, the trustees named in said agreement, and this Company, which said proposed agreement has been submitted to this Board by its Executive Committee, will be of great benefit to this Company, and ought, in the best interests of this Company, to be executed;

Resolved, That the officers of the Company be, and they hereby are authorized and

directed to execute said agreement on behalf of this Company;

Resolved, further, That * * * a special meeting of the stockholders is hereby directed to be called * * * on the 14th day of April, 1919, * * * to consider a proposal to increase the capital stock of this Company from three million dollars to three million four hundred thousand dollars with the object and for the purposes stated in the proposed agreement above set forth; to consider and, if in the judgment of the stockholders such action ought to be taken, to approve and ratify the agreement dated the 18th day of March, 1919, above set forth, executed by the officers of the Company, pursuant to the direction contained in those resolutions; and further to consider and adopt such other and further resolutions as may be desirable or expedient in effecting the object and purposes of said agreement; * * *

On April 15, 1919, a meeting of the stockholders of the Trust Company was held for the purpose of considering the agreement hereinbefore mentioned and the action of the board of directors relative thereto. At this meeting the stockholders approved and ratified the action of the board of directors and the following resolution was adopted:

* * * *Resolved, That* in order to provide capital in amount sufficient and proper to carry into effect the agreement signed on the 18th day of March, 1919, by the stock-

holders of the Home Savings Bank, the Home Savings Bank, B. Francis Saul, James F. Shea, and Howard Moran, as trustees, and the American Security & Trust Company, that the capital stock of this company be increased from its present amount of three million dollars (\$3,000,000) to three million four hundred thousand dollars (\$3,400,000), said increase to consist of four thousand (4,000) shares of the par value of \$100 each.

Resolved, That the stockholders of this Company do hereby authorize the said increase in the capital stock of this Company from three million dollars, consisting of thirty thousand shares of the par value of \$100 each to three million four hundred thousand dollars, consisting of thirty-four thousand shares of the par value of \$100 each.

Resolved, That the said four thousand shares of stock when issued shall be issued to the trustees named in the above-mentioned agreement to carry out the object and purposes of said agreement, upon the payment to this Company of the sum of four hundred thousand dollars (\$400,000).

* * * * *

The stock of the Bank was not quoted on any stock exchange. The bid price for this stock on the Washington Stock Exchange was \$420 a share for 10 shares in January, 1919, and during the period from January to March 28, 1919, there were offers

made through the Washington Stock Exchange to purchase the Bank stock at \$420 a share. Between the date of the Trust Company's offer to acquire the assets and stock of the Bank and before the transaction was consummated the vice president of the Bank purchased from the Bank's president five shares of stock at \$460 a share.

Between January 10 and April 16, 1919, the following sales of the Trust Company's stock were made on the Washington Stock Exchange:

Date	Number of shares	At—
Jan. 10.....	10	\$221
20.....	15	222
Feb. 8.....	20	222
Mar. 13.....	10	221
15.....	8	220
24.....	10	233
26.....	10	233
28.....	12	234
28.....	6	234
Apr. 1.....	2	236
16.....	5	237

On May 10, 1919, the Trust Company's stock sold for \$239 a share. On May 15, five shares were sold at \$240; on June 5, ten shares at \$243; and on June 10, two shares at \$239.

The terms of the agreement were carried out and the transaction, as consummated at the close of business on April 19, 1919, was executed in detail as follows:

The transfer, assignment, and conveyance of all the assets of the Bank to the Trust Company, the assumption by the Trust Company of the Bank's

liabilities, the issuance to and the receipt by the Trustees on behalf of the stockholders of the Bank of a check issued by the Trust Company for \$400,000, the delivery to the Trust Company of the 1,000 shares of the Bank stock by the trustees, the deposit by the trustees of the check for \$400,000 in the Riggs National Bank to the credit of their account, the drawing of a check on this account by the trustees for \$400,000 payable to the Trust Company, and the issuance and delivery by the Trust Company to the trustees for the stockholders of the Bank of a certificate for 4,000 shares of the Trust Company stock, the same being endorsed by the trustees and returned to the Trust Company with instructions to issue certificates to each of the former stockholders of the Bank. Pursuant thereto, each of the former stockholders of the Bank received a certificate for four shares of Trust Company stock for each share of Bank stock formerly owned by him.

It was necessary for the Trust Company, being a District of Columbia corporation, to obtain a certificate from the Comptroller of the Currency that its increased capital stock of \$400,000 had been paid in. In a letter dated April 21, 1919, the Trust Company notified the Comptroller of the authorization and issuance of the \$400,000 increased capital stock, and furnished him with a copy of the minutes of the meeting of its stockholders held April 14, 1919, in which was incorporated in full the agreement of

March 18, 1919. On April 22, 1919, the Comptroller of the Currency issued a certificate that the \$400,000 of stock had been issued as required by law, as follows:

Whereas satisfactory evidence has been transmitted to the Comptroller of the Currency that the capital stock of the American Security and Trust Company, located in the City of Washington, District of Columbia, has been increased in the sum of Four Hundred Thousand Dollars (\$400,000), pursuant to the provisions of the Code of Law of the District of Columbia, and that the whole amount of such increase has been paid in, and that the paid-up capital stock of said company now amounts to the sum of Three Million Four Hundred Thousand Dollars (\$3,400,000);

Now, it is hereby certified that the capital stock of the American Security and Trust Company has been increased in the sum of Four Hundred Thousand Dollars (\$400,000); that said increase of capital has been paid in as a part of the capital stock; and that the said increase of capital is approved by the Acting Comptroller of the Currency.

In witness whereof, I hereunto affix my official signature and seal of office.

Each of the stockholders determined the profit or loss upon the sale of the Bank stock as the difference between the cost, on March 1, 1913, value thereof, and the sales price of \$400 a share. The Commissioner, in his original determination, held

that the transaction was an exchange of stock for stock within the meaning of section 202 (b) of the Revenue Act of 1918 and determined the fair market value of the Trust Company's stock to have been \$235 a share, resulting in the deficiency hereinbefore mentioned. By amendment to his answer to the petitions herein the Commissioner now claims, in accordance with the Board's decision in the proceedings of *B. F. Saul et al.*, 4 B. T. A. 639, the transfer by petitioners of their stock to the American Security & Trust Company was a sale and that the profit upon the transaction should be computed by including as the consideration received for the bank stock \$400 a share, cash received, plus \$120, the fair market value of the right to subscribe to four shares of the Trust Company's stock at \$100 a share for each share of bank stock sold, making the total consideration received by the petitioners for each share of Home Savings Bank stock \$880 a share.

After finding the foregoing facts the Board held that the above transaction resulted in a sale by appellants of their shares of stock in the Bank for \$880 per share, being \$400 in cash plus \$480, the value of the right to purchase four shares of the stock of the Trust Company at par, and that \$880, less the cost, or March 1, 1913, value of the Bank stock, is the proper measure of profit per share of the Bank to each of these taxpayers. From that determination these appeals are taken.

SUMMARY OF ARGUMENT

A right accruing to a stockholder in one corporation, without disposing of his stockholdings, to purchase shares of stock in another corporation at an amount less than their actual value, is essentially analogous to a dividend. A dividend issued in the stock of another corporation is taxable as income and is readily distinguishable from a stock dividend which is not so taxable. By a parity of reasoning a right accruing to a stockholder in one corporation, upon sale of his shares of stock, to purchase stock in another corporation at less than the actual value of that stock, is equivalent to cash and is taxable as income. Appellants, having sold each of their shares of stock in the Bank for \$400 cash and the right to purchase four shares of stock of the Trust Company at par, valued at \$480, are taxable on the difference between \$880 and the cost or March 1, 1913, value of their shares of Bank stock.

ARGUMENT

The right given the stockholders of a Bank, as part consideration for the absorption of the Bank by a Trust Company, to purchase stock of the Trust Company at less than the market rate, is equivalent to cash and taxable as income

Appellants contend that the right of the stockholders of the Bank to acquire stock of the Trust Company at less than the market rate was not transferable and therefore had no market value. That is their sole contention on the main issue and their

principal reliance for reversal. The claim is not sound as a proposition of law and if it were it would not control this case.

It seems to be undisputed that the transaction here involved constituted a sale. Before the Board of Tax Appeals the appellants contended that it was not an exchange of stock for stock (R. 6, 13), and on page 14 of their brief they denominate it a sale. The question then is whether it was such a sale as resulted in taxable gain. It is admitted that there was some taxable gain, but appellants contend that it is limited to the cash received by stockholders of the Bank and does not extend to their right to acquire stock of the Trust Company below the market. The only reason assigned for this claim is that such rights were not negotiable. The same claim is made in a number of places in the brief and the only authority given is the statement of the appellants, which, we submit, is not conclusive. There is no provision in the contract, express or implied, that would prevent the stockholders from disposing of such rights. If such an inhibition existed, the burden was on the appellants to prove it. And if the law places any impediment in the way of an alienation it is the duty of the appellants to point it out.

But even if the contention be sound that the "rights" were non-negotiable it does not follow that they have no value. Appellants make the claim that since they could not transfer their "rights" such rights had no market value but they fail to say why.

It is clear that the purpose of the contract was to make the right to purchase shares in the Trust Company a part of the consideration for the stock of the Bank and it is equally clear that the contract was carried out in such a way as to effectuate that purpose.

Appellants, on page 17 of their brief, "maintain that the principles of law announced by the Supreme Court of the United States in the cases of *Eisner v. Macomber*, 252 U. S. 189; *Weiss v. Stearn*, 265 U. S. 242; and *Miles v. Safe Deposit & Trust Co.*, 259 U. S. 247, are controlling here." These cases certainly do not touch the only point raised by the appellants in this connection, namely, that the "rights" had no market value because not transferable. Let us see if they are controlling here, as claimed by the appellants, and in doing so let us begin with a predecessor of those cases.

In the case of *Towne v. Eisner*, 245 U. S. 418, the Supreme Court had before it the question of the taxability of a stock dividend. The Court held that a stock dividend was not income, and was consequently not taxable, saying (p. 426):

A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased.

The Supreme Court reaffirmed the doctrine of the *Towne* case in the case of *Eisner v. Macomber*,

252 U. S. 189. In that case the Court had occasion to determine what was meant by "income," and followed and added to its decision in the case of *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179, 185, saying, (p. 207) :

"Income may be defined as the gain derived from capital, from labor, or from both combined," *provided it be understood to include profit gained through a sale or conversion of capital assets, * * ** (Italics supplied.)

In both of these cases the corporation declared a stock dividend in its own stock, and in no sense was there involved any sale. The distinction between those cases and this one is readily apparent. In the instant case appellants actually sold their stockholdings in the Bank, and in part payment therefor received interests in an entirely different corporation.

Shortly after the decision of the Supreme Court in the *Towne* case that Court decided the case of *Peabody v. Eisner*, 247 U. S. 347, and the principles there laid down are controlling here. In that case the Union Pacific Railroad Company declared a dividend partly in cash and partly in the preferred and common stock of the Baltimore and Ohio Railroad. The Commissioner taxed this dividend in its entirety. The taxpayer contended that the *Towne* case controlled and that the dividend not received in cash was not taxable. The Court, however, held

that the stock so received was taxable income, saying (p. 349) :

It hardly is necessary to say that this case is not ruled by our decision in *Towne v. Eisner*, since the dividend of Baltimore & Ohio shares was not a stock dividend but a distribution *in specie* of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value of money. It is controlled by *Lynch v. Hornby*, this day decided, *ante*, 339.

Applying that principle to the facts of this case the rights in the stock of the Trust Company received by the stockholders of the Bank were equivalent to the cash value thereof. There soon followed the case of *United States v. Phellis*, 257 U. S. 156. In that case the New Jersey Dupont Company decided to reorganize in Delaware. Its funded debt and capital stock were in excess of \$60,000,000. The new corporation was capitalized at \$240,000,000. The assets and good will of the old company were transferred to the new at \$120,000,000, the stockholders of the old company retaining their stock and receiving as a dividend two shares of the common stock of the new company for one share of the old. The dividend in stock was held to be taxable, the Court saying (p. 174) :

In thus creating the common stock of the new company and transferring it to the old company for distribution *pro rata* among its

stockholders, the parties were acting in the exercise of their rights for the very purpose of placing the common stockholders individually in possession of new and substantial property rights *in esse*, in realization of their former contingent right to participate eventually in the accumulated surplus. No question is made but that the proceedings taken were legally adequate to accomplish the purpose. The new common stock became treasury assets of the old company, and was capable of distribution as the manufacturing assets whose place it took were not. Its distribution transferred to the several stockholders new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers. According to the findings the stock thus distributed was marketable. There was neither express nor implied condition, arising out of the plan of reorganization or otherwise, to prevent any stockholders from selling it; and he could sell his entire portion or any of it without parting with his capital interest in the parent company, or affecting his proportionate relation to the interests of other stockholders. Whether he sold the new stock for money or retained it in preference, in either case when he received it he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.

The Supreme Court maintained the same view, and reaffirmed this case in *Rockefeller v. United States*, 257 U. S. 176; *Cullinan v. Walker*, 262 U. S. 134, and *Marr v. United States*, 268 U. S. 536.

In the *Marr case* the General Motors Company of New Jersey had outstanding \$15,000,000 of 7% preferred stock, and \$15,000,000 of common stock, of a par value of \$100 per share. The company also had a large surplus. A Delaware corporation was organized with \$20,000,000 of 6% nonvoting preferred stock and \$82,600,000 of common stock, all of the par value of \$100. The old stock was exchanged for the new on the basis of 5 to 1 of the common stock and 1½ to 1 of the preferred stock. Following the exchange, the New Jersey company was dissolved. The Government imposed a tax on the difference between the March 1, 1913, value of the old stock and the value of the stock of the new corporation received in the exchange. The Court held that all of the new securities issued in excess of the capitalization of the old company represented income earned by it, and when distributed the gain was taxable. The gain was represented by securities with essentially different characteristics, and in an essentially different corporation, and it was held to be income under the authority of the *Phellis*, *Rockefeller*, and *Cullinan cases*.

The very apparent distinction between the *Towne* and *Macomber cases*, relied on by appellants, and the *Phellis*, *Rockefeller*, *Cullinan*, and *Marr cases*

was recognized by the Circuit Court of Appeals for the Second Circuit in an opinion (not yet published) rendered on April 8, 1929, in the case of *Estate of Edwin D. Metcalf* (*Carrie W. Metcalf, Edwin F. Metcalf, Harold G. Metcalf, and Stanley W. Metcalf, Executors*) v. *Commissioner*. In that case the decedent was a stockholder of the Southern Pacific Company and his executors received rights to purchase shares of stock of the Pacific Oil Company under the following circumstances: On December 1, 1920, the Board of Directors of the Southern Pacific Company advised its stockholders of a plan adopted for the separation of its California oil porperties. The essential feature of the plan was the organization of the Pacific Oil Company with a capital stock of 3,500,000 shares of no par value. It allotted one share of stock of the Pacific Oil Company to each share of the Southern Pacific Company. The latter company subscribed for the shares of the Pacific Oil Company at \$15 per share, and turned over to the Pacific Oil Company the California properties, receiving therefor a purchase price of \$47,250,000. This left in the treasury of the Pacific Oil Company a fund for working capital. The Southern Pacific Company then issued to each of its stockholders the right per share to subscribe to one share of capital stock of the Pacific Oil Company at \$15 per share. The stock of the Southern Pacific Company and the Pacific Oil Company were listed on the New

York Stock Exchange and *actually* bought and sold. On February 7, 1921, the Southern Pacific Company stock was sold with stock rights and quoted at 96 low, 97 $\frac{1}{8}$ high. On February 8, 1921, it was sold ex-rights at 78 $\frac{1}{4}$ low, 79 $\frac{1}{8}$ high. The rights were sold on February 8, at 33 $\frac{5}{8}$ low and 34 $\frac{1}{4}$ high. The subscription cost of \$15 per share would make the rights worth \$18 per share. The estate in fact sold its rights for \$18 per share.

In following the *Phellis*, *Rockefeller*, *Cullinan*, and *Marr* cases the Court in the *Metcalf* case said:

Thus, where a stockholder receives a distribution of the assets of a corporation in cash or in stock of a different enterprise, such distribution is for taxing purposes a dividend. No sound distinction can be drawn between a distribution of stock of another corporation and one of valuable rights to purchase such stock. Each may be sold at its selling price. The rights this petitioner sold netted \$18 per right. They amounted to a distribution of assets of the company of which it was a stockholder, just as much as an actual distribution of stock of the Baltimore and Ohio Railroad by the Union Pacific Company did in the Peabody case. There was a distribution in specie of a portion of the assets of the Southern Pacific Company. A distribution of earnings or assets of a corporation is a distribution whether or not so determined.

That the rights were in that case actually sold is the only fact distinguishing it from the instant

case. However, that fact did not in any way influence the Court in its decision. It was merely an indication of the value of the rights. It is evident from the decision that the value of that right could have been otherwise determined, that the value of the rights was taxable, whether sold or retained, that the fact is mentioned only to establish the market value of the right, and that it does not in any way affect the principle involved. Furthermore, in the *Peabody*, *Phellis*, and *Marr cases*, relied upon by the Court in the *Metcalf case*, no question of sale arose.

The Court in the *Metcalf case* distinguished the case of *Miles v. Safe Deposit Co.*, 259 U. S. 247, relied upon by appellants. In the *Miles case* the right to purchase shares of stock of the Hartford Fire Insurance Company resulting from increased capitalization at less than their actual value was a right to purchase stock in the company granting the right, accruing only to stockholders of that company as distinguished from the right in the *Metcalf case* and in the instant case to purchase stock in another company. This distinction is all-important, for it is the very factor which distinguishes the *Peabody*, *Phellis*, and *Marr cases* from the *Towne* and *Macomber cases*, above mentioned.

The other cases relied upon by appellants are equally inapplicable, as an examination thereof will indicate. In the case of *Weiss v. Stearn*, 265 U. S. 242, the Court had before it a reorganization, and

found that the stockholders received nothing really different from that which they had before the reorganization. On the particular facts in that case, the Court said (p. 254):

Considering the entire arrangement we think it amounted to a financial reorganization under which each old stockholder retained half of his interest and disposed of the remainder.

In the instant case appellants disposed of all their holdings in the Bank and received in return therefor interests in the Trust Company, something entirely different. The cases are not parallel.

In the case of *Bourn v. McLaughlin*, 19 F. (2d) 148, plaintiff exchanged property for a minority interest in a family corporation the stock of which had no market at the time the stock was issued and which could not have been disposed of except at such a sacrifice as to amount to a virtual donation. The Court, basing its opinion of what constitutes income on the authority of *Eisner v. Macomber*, *supra*, held that upon an exchange of properties, when the value of the property received, if any, can not be determined, there is realized no taxable income.

That case surely is not authority here where there was market for the property received, the property having a market value, so that it had an equivalent to cash, and there was realized in consequence a taxable gain.

In *Trust Co. of Georgia v. Rose*, 25 F. (2d) 997, the Trust Company, as members of a banking syndicate, bought certain securities at less than the price for which the stock was subsequently sold to the public, under an agreement to hold them for five years. The Court had before it a pure purchase, with only a paper profit, which it was sought to tax. There is no question of a sale of any assets for a consideration and of actual profit as in the instant case. The Court there held that "no taxable gain was *realized* in this stock by its mere purchase."

The distinguishing features between all of the cases cited by appellants and the instant case are too clear to require extended comment. In the instant case appellants sold their stockholdings in the Bank to the Trust Company for \$400 in cash and the right to purchase 4 shares of stock of the Trust Company at par for each share of Bank stock so sold. They received something essentially different from that which they had before the transaction took place. The profit, if any, is taxable gain.

At the time the agreement of March 18, 1919, was entered into the stock of the Trust Company was worth \$220 a share (R. 24), or \$120 in excess of par, so that the 4 shares were worth \$480 more than their par value. The aggregate consideration was, therefore, \$880 for each share of Bank stock sold. The difference between this sum and the cost or March 1, 1913, value of the Bank stock is taxable gain.

Appellants, in their brief, make much of their claim that there must be a sale of the "rights" here involved before there can be any realized profit. They misconceive the purport of the authorities. The sale took place when they surrendered their Bank stock for cash and the "rights." The "rights" were the result of the sale, the consideration therefor. No second sale was needed to show the value of the "rights." The gain derived by the appellants from the acquisition of the "rights" here involved was plainly a "profit gained through a sale or conversion of capital assets" as defined in the *Macomber case, supra*.

It being clear that the "rights" with which we are now concerned were valuable and produced taxable income the only remaining problem is to determine the correct amount of tax due.

Appellants contend that the market value of the shares of stock of the Trust Company on March 18, 1919, is no evidence of the value of the right to buy those shares on that date at less than their actual value. It seems too clear for argument that the value of a right to buy stock at a certain rate is the difference between the cost of the stock under the "right" and what the cost would have been without the right. As heretofore pointed out, where stock itself is actually transferred in exchange for other stock or as a dividend, the value of the property so received in excess of the cost of March 1, 1913, value of the holdings is subject to

tax. So, too, where a corporation gives its stockholders valuable rights to subscribe to stock of another corporation at less than its actual value, there is realized taxable income. It is not perceived on what theory a sale for cash and for the right to purchase stock at less than actual value should be treated differently. The Circuit Court of Appeals for the Second Circuit in the case of *Metcalf v. Commissioner, supra*, was evidently not much impressed by such contention when it said:

No sound distinction can be drawn between a distribution of stock of another corporation and one of valuable rights to purchase such stock. Each may be sold at its selling price.

Finally, appellants contend that the sales of shares of stock of the Trust Company as set forth in the record do not constitute any evidence of the market value of the 4,000 shares acquired by the stockholders of the Bank, relying on *Virginia v. West Virginia*, 238 U. S. 202, 212. This Court is not presented with the same question as was before the court in that case, where there was involved the question of proving the value of a large block of stock by two sales of an unknown number of shares. Here we are dealing with blocks of 10 shares and 29 shares of stock of the Bank, sold for cash and for the right to purchase but 40 shares and 116 shares, respectively, of stock of the Trust Company. The evidence shows that the stock of the Trust Company was sold in lots of 10, 15, and 20,

substantially the same quantities as are here involved. This point of the appellants in the presence of these facts is not well taken. Moreover, that case utterly annihilates appellants' theory when the opinion says (p. 213) :

The fact, however, that there was no sufficient proof of market value was not an insuperable obstacle to the making of a fair valuation. It was clearly proper to introduce evidence tending to show the intrinsic value of the shares.

A bona fide sale is relevant to prove value. *First Nat. Bank v. Fox*, 40 Apps. D. C., 430, 438. The price realized on actual sales made in the usual and customary manner is admissible to fix the market value of securities. "It stands as a criterion of value, because it is a common test of the ability to purchase the thing." *Henry v. North American Ry. Const. Co.*, 158 Fed. 79, 81.

Although such evidence is necessarily not conclusive, and the stock may be shown to have had greater or less intrinsic value, it is evidence of value and in the instant case actual sales on the Stock Exchange were relied on by the Board in the absence of any rebuttal evidence. Being competent evidence of the value of the stock in question it was evidence of the value of the right to purchase such stock at less than its actual value, and in the absence of other evidence the sales were received by the Board as being sufficient to establish their value.

There remains to be discussed only the question raised by appellants' assignments of error IV and V, namely, that the record in another case was inadmissible to prove sales of the stock of the Trust Company.

The statement with respect to what occurred at the trial before the Board contained at pages 31 and 32 of appellants' brief, which statement forms the basis for assignments of error IV and V, upon which appellants have predicated Point II and part of Point III of their brief, is entirely erroneous and is contradicted by the record. The facts are as follows:

Attorney for respondent, appellee here, offered in evidence as proof of the value of the stock of the Trust Company on the pertinent date the findings of fact with respect to sales of such stock on the Washington Stock Exchange found by the Board in a prior case arising out of the same transactions as are here involved (*B. F. Saul et al.*, 4 B. T. A. 639). Counsel for petitioners, appellants herein, objected to this offer on the ground that findings of fact in another case in which these appellants were not parties was not competent evidence against them. Upon further discussion, however, it became evident that the real basis for the objection was the contention of counsel for petitioners that the fact of sales of the stock in question was not material in proving the value of the rights to purchase such stock, an objection relating to the materiality of the

evidence, but relating in no way to the manner in which or means whereby such sales were proved. Counsel for appellee then called attention to the fact that he was offering in evidence the findings of the Board with respect to the sales of stock merely *in lieu of witnesses* who would testify to these facts. Thereupon counsel for appellants abandoned his objection as to the competency of the findings in question, and expressly agreed to the admission of the findings of fact of the Board as evidence of the fact of the sales of this stock, objecting only to the materiality of these facts with respect to the issues before the Board.

In other words, counsel for appellants first objected on the ground that the Board's findings of fact in the *Saul case* were inadmissible because incompetent. He further contended that the fact of the sales was immaterial. Subsequently he expressly agreed to the admission of these findings, objecting only to their materiality, and the Board reserved its ruling on the question of materiality only. There was no question of competency before the Board and the Board did not rule on that question. Consequently no error can be predicated on such ground.

The record is very clear on this point and is incapable of an interpretation such as that given by appellants in their brief in support of assignments of error IV and V (R. 49):

The MEMBER. Mr. Hoover (attorney for appellants), are you willing to stipulate, sub-

ject to the objections you have indicated, that these sales were made at the times and the prices set out in the finding of fact in the B. F. Saul case?

Mr. HOOVER. With the understanding that we reserve our objection on the record, and by consenting that this may be used in lieu of witnesses being called to testify to that; it being further received over our objection and subject to our exception. With that understanding, it may go in.

This condition being somewhat involved, and desiring to have the record clearly show the position of appellants, counsel for appellee asked:

Subject to the same objections as might be made if we called a witness to testify to these facts?

To this, counsel for appellants answered:

If you called a witness to testify that these sales were made on the Stock Exchange, we would make the objections I have already stated. Without waiving such objections we would have no objection to this being used in lieu of the testimony of a witness if he were on the stand. (Italics supplied.)

In the presence of such a statement it is not perceived how appellants can now contend that they objected to the admission of the findings of fact in the *Saul case* as evidence of the fact of the sales which otherwise would have been established by witnesses.

Upon this statement being made, the findings of fact were admitted in lieu of witnesses without objection except as to the materiality of the evidence so admitted upon the issues before the Board as clearly appears from page 50 of the record.

The MEMBER. Very well, the tabulation of sales appearing at the top of page 7 of the Board's mimeograph of the B. F. Saul appeal, detailing sales, date, and amount received, including those made on May 10th and May 15th, referred to immediately below the tabulation, will be received in evidence, and treated as if a witness had so testified, subject to the objections reserved by counsel, and an exception will be noted if it be adverse to the position taken by counsel.

Mr. HOOVER. That is satisfactory to me.

From the foregoing it would seem to be undeniable that counsel for appellants herein did not object to the findings of fact being introduced into the record as evidence of the sales on the market of shares of stock of the Trust Company, but on the contrary expressly agreed thereto. Assignments of error IV and V, therefore, are clearly not justified by the record.

Assignments of error must be limited to rulings or questions of which the appellants are entitled to complain, that is, to rulings or questions raised before the lower court. Assignments of error can not raise questions which were not raised and passed on by the lower court, or which were not

preserved for review by timely and proper objections and exceptions in the lower court. *Insurance Co. v. Folsom*, 18 Wall. 237, 253; *Stanley v. Supervisors of Albany*, 121 U. S. 535, 547; *Lehnen v. Dickson*, 148 U. S. 71, 73; *Ogden City v. Weaver*, 108 Fed. 564; *Mexico International Land Co. v. Larkin*, 195 Fed. 495; *Gibson v. Luther*, 196 Fed. 203.

The distinction between the instant case and the cases cited by appellants in support of their assignment of error IV is clear. In those cases objection was made in each instance and the findings of fact were admitted in evidence over the objection of counsel and an exception to that ruling noted. In the instant case the findings of fact were admitted upon agreement of counsel.

Assignment of error V is based upon appellants' misconstruction of the Board's ruling with respect to the sales of Trust Company stock as found in the *Saul case*. There was evidence before the Board as to the market value of the stock in question, which evidence was admitted by agreement of counsel, and this evidence was a clear indication of the value of the right to buy this stock at less than its actual value.

The appellants have been wholly unsuccessful in showing that the "rights" here involved were not transferable; or that they were without a market value because not transferable; or that they were without value because there was no market. It is

respectfully submitted that since this appeal is based on the foregoing propositions appellants have completely failed to carry the burden cast upon them

CONCLUSION

Appellants, upon the sale of their shares of Bank stock having received for each share of Bank stock sold \$400 in cash and rights to subscribe to 4 shares of stock of the Trust Company of a value of \$480, derived taxable gain equal to the difference between this sum and the cost or March 1, 1913, value of their Bank stock. It is submitted that the order and judgment of the Board of Tax Appeals should therefore be affirmed.

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